

COPY

# **TRANSCRIPT OF RECORD**

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1960**

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**No. 143**

**WILLIE LEE STEWART, PETITIONER,**

**VS.**

**UNITED STATES**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**PETITION FOR CERTIORARI FILED APRIL 29, 1960  
CERTIORARI GRANTED JUNE 13, 1960**

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## INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the District of Columbia Circuit	1	1
Joint appendix consisting of proceedings transpiring before the United States District Court for the District of Columbia	1	1
Docket entries	1	1
Indictment	15	16
Plea	17	17
Order for mental examination	17	17
Order enlarging time for mental report	18	19
Report on defendant's mental condition	19	20
Petition for further mental examination and hearing on the determination of defendant's mental competency	20	21
Order for mental examination	23	23
Report on defendant's mental condition	24	24
Order directing further mental examination	24	25
Order re transcript	25	25
Order re defendant's mental capacity	26	26
Recital re trial and verdict	26	27
Defendant's requests for instructions	27	27
Motion for new trial and denial thereof	32	32
Judgment and commitment	33	33
Notice of appeal	34	34



Joint Appendix consisting of proceedings transpiring before the United States District Court for the District of Columbia—Continued

	Original	Print
Excerpts from transcript of proceedings	229	35
Excerpts from testimony of prior trial read into record	229	35
Testimony of Irene Anderson—		
Direct	230	35
Cross	240	42
Testimony of Julia Mary Daniels—		
Direct	243	44
Cross	252	50
Redirect	259	54
Recross	261	55
Testimony of Yancy Peterson—		
Direct	268	58
Cross	271	60
Testimony of Geneva Mason—		
Direct	276	62
Cross	289	70
Redirect	294	73
Testimony of James I. Irby—		
Direct	295	73
Cross	303	78
Redirect	307	80
Recross	307	80
Colloquy between Court and counsel	308	81
Excerpts from transcript of proceedings of third trial	320	87
Testimony of Annie Lee Stewart—		
Direct	320	87
Cross	339	99
Redirect	351	106
Testimony of Robert Lee Coleman—		
Direct	355	109
Cross	364	114
Testimony of Betty Whorton—		
Direct	364	115
Cross	371	119
Redirect	373	120
Colloquy between Court and counsel re stipulation	377	122
Testimony of Willie Lee Stewart—		
Direct	393	132
Cross	401	137
Motion for mistrial and to withdraw a juror and denial thereof	407	140
Testimony of Dr. Ernest Young Williams—		
Direct	409	141
Cross	443	162

Joint Appendix consisting of proceedings transpiring before the United States District Court for the District of Columbia—Continued

Excerpts from transcript of proceedings of third trial—Continued

	Original	Print
Motion for a mistrial and to withdraw a juror and denial thereof .....	458	169
Testimony of Dr. Ernest Young Williams—		
Cross (resumed) .....	459	170
Redirect .....	481	183
Recross .....	496	193
Testimony of Dr. Elmer Klein—		
Direct .....	498	194
Cross .....	517	206
Redirect .....	538	218
Recross .....	540	220
Redirect .....	542	221
Recross .....	543	222
Testimony of Dr. Morris Kleinerman—		
Direct .....	544	223
Cross .....	561	233
Redirect .....	611	261
Recross .....	614	263
Redirect .....	630	273
Testimony of James W. Hamilton—		
Direct .....	632	274
Cross .....	638	278
Testimony of Earl Jones—		
Direct .....	641	280
Cross .....	652	287
Testimony of Robert M. Depro—		
Direct .....	653	288
Cross .....	711	325
Redirect .....	728	336
Testimony of William G. Cusard—		
Direct .....	732	338
Cross .....	752	351
Redirect .....	755	353
Recross .....	756	353
Redirect .....	758	354
Recross .....	759	355
Testimony of Dr. Mary V. McIndoo—		
Direct .....	762	356
Cross .....	768	360
Redirect .....	777	365
Colloquy between Court and counsel .....	777	366
Court's charge to jury .....	867	368
Colloquy between Court and counsel .....	876	374
Verdict .....	882	378

	Original	Print
Opinion, Burger, J. ....	886	380
Dissenting opinion, Fahy, J. ....	902	394
Judgment ....	905	399
Order denying petition for rehearing ....	909	400
Order granting motion for leave to proceed in forma pauperis and petition for writ of certiorari ....	910	400

[fol. 1]

1

**IN THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT**

**Joint Appendix**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF  
COLUMBIA**

**Holding a Criminal Term**

**THE UNITED STATES OF AMERICA**

**v.**

**WILLIE LEE STEWART, ANNIE LEE STEWART, WILLIS DANIELS**

**Criminal No. 633-53**

**Grand Jury Nos. 477-53; 437-53**

**First Degree Murder, 22 D.C. Code 2401. Robbery, 22 D.C.  
Code 2901. Accessory After the Fact, 22 D.C. Code 106**

**CRIMINAL DOCKET ENTRIES**

**Parties: United States; vs., 1. Willie Lee Stewart,  
2. Annie Lee Stewart, 3 Willis Daniels.**

**Attorneys: U.S. Attorney, #1: Stanley Dietz, #1: Foster  
Wood, #1: John Alvin Croghan, #2: Foster Wood,  
#3: Foster Wood, #1: B. V. Lawson 2001 11th St., NW,  
#1 C. Duncan 473 Florida Ave. NW, #1 E. L. Carey 910  
17th St., NW, #1 R. Ackerly-Cafritz Bldg.**

**G. J. No. No. 1: 477-53, No. 2, 3: 437-53.**

**Bond: 3-23-53, \$1500 P. W. Howard, Jr. 3-19-53, \$1500  
P. W. Howard, Jr. 3-20-53, \$500 P. W. Howard, Jr., In re:  
James E. Williams-Witness.**

**1953**

**Proceedings**

**Apr. 13 Presentment and Indictment filed (4 counts)  
Each: Copy of indictment given deft. Cert. filed.**

**Apr. 14 Each: Appearance Foster Wood entered, filed.**

1953

## Proceedings

Apr. 17 Each: Indictment Read, Arraigned, Plea Not Guilty entered, 10 days, etc. No. 1: Defendant remanded to the District of Columbia Jail;

[fol. 2]

Apr. 17 Each: Attorney Foster Wood present. Schweinhaut, J. cert. filed. (Reporter-MacReynolds)

Apr. 20 No. 1: Affidavit in support of application for leave to proceed without prepayment of costs and Order granting applicant leave to proceed without prepayment of costs, filed. Curran, J.

Apr. 27 No. 1: Motion of defendant for mental examination, affidavits (2), filed. Cert. of Serv.

Apr. 27 Each: Motion of defendant for severance, filed. Cert. of Serv.

May 4 Each: Answer of the U.S. in opposition to defendant's motion for severance, filed. Cert. of Serv. Each: Answer of U.S. in opposition to defendant's motion for Mental Examination, Report of Psychiatric Examination of defendant, Willie Lee Stewart by Elmer Klein, MD., filed. Cert. of Serv.

May 8 No. 1: Motion for mental examination heard and denied. Defendant remanded to District of Columbia Jail; Attorney Foster Wood present. Curran, J. (Reporter-Powell) Nos. 1, 2, 3: Motion for severance heard, argued and denied. Motion for leave to file motion within 5 days granted. Attorney Foster Wood present, Curran, J. (Reporter-Powell) Cert. filed.

May 13 Nos. 2, 3: Motion of defendant to dismiss, filed. Cert. of Serv.

May 20 No. 1: Opposition to defendant's motion to dismiss the 4th count and points and authorities in support thereof, filed. Cert. of Serv. Opposition to defendant's motion to dismiss the 3rd count and points and authorities in support thereof, filed. Cert. of Serv.

May 22 Nos. 2, 3: Motion to dismiss denied. Attorney Not present. Curran, J. Cert. filed. (Reporter-Powell)

May 22 No. 1: Copy of Capital List served on defendant personally May 20, 1953, 4:20 P.M. at D.C. Jail, filed.

1953

## Proceedings

May 29 Nos. 2, 3: Motion of defendant for Bill of Particulars, filed. Cert. of Serv.

Jun. 3 Nos. 2, 3: Answer of the U.S. in opposition to defendant's motion for a bill of particulars, filed, Cert. of Serv.

Jun. 5 Nos. 2, 3: Motion for a bill of particulars Denied. ~~Attorney~~ not present. Curran, J. (Reporter-Powell) Cert. filed.

[fol. 3]

Jun. 5 No. 1: Copy of Capital List served on defendant personally within the D.C. Jail, June 3, 1953 at 5:00 P.M., filed.

Jun. 16 Each: Jurors from Criminal Courts Nos. 1, 3, 6 Sworn on Voir Dire; Empanelling begun; Case respite until the meeting of the Court, Thursday, June 18, 1953 at 10:00 A.M. No. 1: Defendant remanded to the District of Columbia Jail; Each: Attorney Foster Wood present. Curran, J. (Reporter-Powell) Cert. filed.

Jun. 18 Each: Order authorizing stenographic transcript at the expense of the U.S., filed. Schweinhaut, J.

Jun. 18 Each: Certificate filed correcting certificate of June 16, 1953, filed.

Jun. 19 Each: Jury Sworn: George T. Laios, Floyd A. Agrell, Russell H. Carpenter, Ida E. Manning, Milton D. Grimsley, Mote E. Dann, Miner S. Ellis, Ewing W. Lawrence, Tom Lung Fong, Joseph J. Lamb, Edith Y. Madden, Lawrence J. Irwin.

Alternate jurors sworn: Mattie M. Quarles, Joseph I. Moore.

Jun. 19 Each: Case respite until 10 A.M. Monday, June 22, 1953; No. 1: Defendant remanded to the District of Columbia Jail; Each: Court orders food for jury (lunch) for duration of trial; Attorney Foster Wood present. Schweinhaut, J. (Reporter-MacReynolds) Cert. filed.

Jun. 22 Each: Trial Resumed, Same Jury; Case respite until 10 A.M. tomorrow; No. 1: Defendant remanded to the D.C. Jail; Each: Court orders food for jury; Attorney Foster Wood present. Schweinhaut, J. (Reporter-MacReynolds) Cert. filed.



1953

## Proceedings

**Jun. 23 Each: Trial Resumed Same Jury; Case respited until 10 A.M. tomorrow; No. 1: Defendant remanded to the D.C. Jail; Each: Court orders food for jury; Attorney Foster Wood present. Schweinhaut, J. (Reporter-MacReynolds) Cert. filed.**

**Jun. 24 Each: Trial Resumed Same Jury; Case respited until tomorrow at 10 A.M. No. 1: Defendant remanded to the D.C. Jail; Each: Court orders food for jury; Attorney Foster Wood present. Schweinhaut, J. (Reporter-MacReynolds) Cert. filed.**

**Jun. 25 Each: Trial Resumed Same Jury; Case respited until 10 A.M.**

[fol. 4]

**Jun. 25 No. 1: Defendant remanded to the D.C. Jail. Each: Court orders food for jury; Attorney Foster Wood present. Schweinhaut, J. (Reporter-MacReynolds) Cert. filed.**

**Jun. 26 Each: Trial Resumed, Same Jury; Alternate Jurors discharged; Verdict: No. 1: Guilty as indicated; No. 2: Guilty as indicated; No. 3: Not Guilty. Nos. 1, 2: Jury polled; Case referred to the Probation Officer of the Court.**

**Jun. 26 No. 1: Defendant remanded to the D.C. Jail; No. 2: Defendant committed to D.C. Jail; No. 3: Defendant discharged; Each: Court orders food for jury; Attorney Foster Wood present. Schweinhaut, J. (Reporter-MacReynolds) Cert. filed.**

**Jul. 1 Nos. 1 & 2: Motion of defendant for a new trial, filed, Cert. of Serv.**

**Jul. 9 Nos. 1 & 2: U.S. Opposition to defendant's motion for a New Trial, filed. Cert. of Serv.**

**Jul. 10 Nos. 1 & 2: Motion of defendants for new trial—submitted by attorney for defendants without argument—denied—Schweinhaut, J. (Reporter-Watson).**

**No. 1: Sentenced to Death by Electrocution on the 16th Day of October, 1953—Order filed (Two cert. copies of order mailed to D.C. Jail) Defendant remanded to the D.C. Jail. Attorney Foster Wood present. Schweinhaut, J. (Reporter-Watson)**

1953

## Proceedings

Jul. 14 No. 1: Receipt acknowledged of Two (2) certified copies of Order setting time for execution of sentence dated July 10, 1953, directing execution on October 16, 1953, from Curtis Reed, Superintendent of the D.C. Jail, filed.

Jul. 14 No. 1: Sentenced to imprisonment for a period of Five (5) years to Fifteen (15) years on Count Two. Defendant remanded to the District of Columbia Jail Judgment and Commitment filed. Attorney Foster Wood present. Schweinhaut, J. (Reporter-Watson)

Jul. 18 No. 1: Order directing that defendant be furnished with Rush Copy of Portion of Transcript, and Ordered that same be paid to the reporter by the U.S., filed. Schweinhaut, J.

[fol. 5]

Jul. 20 No. 1: Notice of Appeal, filed. Affidavit in support of application for leave to proceed on appeal without prepayment of costs, Granted. Tamm, J.

Jul. 24 Each: Transcript of Proceedings, 6-19-53, Vol. I, pages 1-65 through Vol. 6, Pages 596-715, filed. Court Copy (Reporter-MacReynolds)

Jul. 28 No. 2: Sentenced to imprisonment for a period of Sixteen (16) months to Four (4) years. Execution of Sentence Suspended. Deft. Placed on Probation in charge of the Probation Officer of the Court for a period of Four (4) years. Recognizance in the sum of One Hundred Dollars (\$100.00) taken.

Attorney Foster Wood present. Schweinhaut, J. (Reporter-O'Neil)

Jul. 29 No. 2: Judgment & Probation of 7-28-53, filed. Schweinhaut, J.

Aug. 10 No. 1: Appellant's designation of Record, filed. Cert. Serv. (Foster Wood)

Aug. 20 No. 1: Counterdesignation of Record, filed, Cert. Serv. (Lewis A. Carroll)

Aug. 26 No. 1: Record on Appeal delivered to Foster Wood in Forma Pauperis (\$19.90)

Oct. 5 No. 1: Motion of defendant for stay of execution, filed. Cert. of Serv.

Oct. 9 No. 1: Date of execution postponed to March 15, 1954; Order setting new date of execution as March 15,



1953

## Proceedings

1954, filed. Micro-Film 10-14-53. Attorney Foster Wood present. Schweinhaut, J. (Reporter-Bettis)

Oct. 14 No. 1: Certified copy of Order setting new date of execution forwarded to Mr. Curtis Reid, Supt. of the D.C. Jail.

Oct. 19 No. 1: Letter from Curtis Reid, Supt., D.C. Jail acknowledging receipt of two certified copies of the Order dated Oct. 14, 1953 directing execution on March 15, 1954, filed.

1954

Sep. 8 No. 1: Mandate from the United States Court of Appeals for the District of Columbia Circuit Reversing the judgments of the United States District Court for the District of Columbia and Remanding the same to the District Court for a new trial, Filed.

[fol. 6]

Sep. 27 No. 1: Mandate from the United States Court of Appeals for the District of Columbia Circuit Reversing the judgment of the United States District Court for the District of Columbia and Remanding the same to the District Court for a New Trial, Presented.

Nov. 8 No. 1: Capital List of Jurors served on the deft. personally at the District of Columbia Jail on November 4, 1954, filed.

Nov. 30 No. 1: Capital List of Witnesses and Jurors served on the deft. personally at the District of Columbia Jail on November 29, 1954, filed.

Dec. 7 No. 1: Stipulation, filed.

1955

Jan. 5 No. 1: Capital List of Jurors served on the deft. personally on January 5, 1955 at the D.C. Jail, filed.

Jan. 10 No. 1: Jurors from Criminal Courts Nos. 3, 4, 5, and 6 Sworn on Voir Dire; Jury Sworn; Samuel L. Acker, Margaret D. Brawner, William A. Aberg, Sr., Juanita O. Johnson, Benjamin M. Butler, Benjamin L. Waldman, Rosalyne V. Austin, Ann Onisko, Julian V. Boudreau, Excel D. Blalock, Clara Heinrich, Aileen I. Huber.

1955

## Proceedings

Alternate jurors called and Sworn: a.1. Thelma S. Cooper. a.2. George H. Burke.

Jan. 10 No. 1: Case Resited until tomorrow morning; Deft. remanded to the D.C. Jail; Certificate of Dr. Louis Ross pertaining to absence from Court of Becky Horikman, filed. Attorney Foster Wood present. Matthews, J. (Reporter-Watson) Cert. filed.

Jan. 11 No. 1: Trial Resumed: same jury; Deft. remanded to the D.C. Jail; Case Respited until tomorrow morning. Attorney Foster Wood present. Matthews, J. (Reporter-Watson) Cert. filed.

Jan. 12 No. 1: Trial Resumed; same jury; Case is Respited until tomorrow morning; Deft. remanded to the D.C. Jail; Attorney Foster Wood present. Matthews, J. (Reporter-Watson) Cert. filed.

Jan 13 No. 1: Trial Resumed: same jury; Verdict: Guilty as indicated; Jury polled; ~~Case is Referred to the Probation Officer of the Court, error.~~

[fol. 7]

Jan. 13 Deft. remanded to the District of Columbia Jail; Order authorizing stenographic transcript at the expense of the United States, Matthews, J. Attorney Foster Wood present. Matthews, J. (Reporter-Watson) Cert. filed.

Jan. 26 No. 1: Transcript of Proceedings: Pages 1-112, Monday, January 10, 1955; Pages 113-237, Tuesday, January 11, 1955; Pages 238-370, Wednesday, January 12, 1955; Pages 371-461, Thursday, January 13, 1955, filed. (Clerk's Copy) (Reporter-Watson)

Feb. 9 No. 1: Order appointing John Alvin Croghan to represent deft. on Appeal, filed. Matthews, J.

Feb. 11 No. 1:—Willie Lee Stewart: Sentenced to Death by Electrocution on the 19th day of August 1955. Oral request of Foster Wood to withdraw as counsel for defendant, approved by the Court. Attorney Foster Wood present. Matthews, J. (Reporter-Watson)

Feb. 14 No. 1: Willie Lee Stewart: Affidavit and Motion to proceed on Appeal in Forma Pauperis, filed and Granted. Matthews, J. Notice of Appeal, filed.

Feb. 16 No. 1: Willie Lee Stewart: Receipt acknowledged of 1 certified copy of the Sentence bearing the date

1955

## Proceedings

of February 11, 1955 and directing Execution on August 19, 1955, from Curtis Reid, Resident Superintendent, D.C. Jail, filed.

Feb. 24 No. 1: Willie Lee Stewart: Praecipe for Transcript of Record, filed. Cert. of Serv.

Mar. 1 No. 1: Willie Lee Stewart: Designation of Record, filed. Cert. of Serv.

Mar. 22 No. 1: Willie Lee Stewart: Record on Appeal delivered to U.S. Court of Appeals for John Alvin Croghan, Atty. in Forma Pauperis. (Clerk's Fee \$9.10).

May 18 No. 1: Willie Lee Stewart: Mandate from the U.S. Court of Appeals for the District of Columbia Circuit Remanding the case to the United States District Court with instructions:

(1) To vacate the sentence heretofore imposed upon the appellant;

(2) To adjudge the appellant guilty of murder in the first degree pursuant to the jury's verdict;

[fol. 8] 1955 May 18 (3) To sentence him, pursuant to the verdict and adjudication and in the manner and form required by Sec. 23-703, D.C. Code (1951), to death by electrocution;

(4) Then to file a judgment of conviction which shall set forth the plea, the verdict, the adjudication and the sentence, which judgment of conviction shall be signed by the trial judge and entered by the Clerk of the District Court, as required by Rule 32 (b), and further ordered by the Court that the mandate herein issue. Forthwith, filed. 5-9-55.

Jun. 16 No. 1—Willie Lee Stewart: Mandate from the United States Court of Appeals for the District of Columbia Circuit Remanding the cause to the United States District Court for further proceedings, Presented. Holtzoff, J.

Aug. 1 No. 1—Willie Lee Stewart: Order vacating sentence of February 11, 1955, filed. Matthews, J.

Oct. 7 No. 1—Willie Lee Stewart: Sentenced to Death by Electrocution on the 6th day of January, 1956. Deft. remanded to the D.C. Jail; Judgment & Commitment of

1955

## Proceedings

October 7, 1955, filed. Attorney John A. Croghan present. Matthews, J. (Reporter-Deeds)

Oct. 14 No. 1:—Willie Lee Stewart: Motion of deft. to proceed on Appeal in Forma Pauperis and Affidavit of deft., filed. Ordered that deft. be allowed to prosecute his proposed appeal to the U.S. Court of Appeals for the District of Columbia without being required to prepay fees or costs before or after taking said appeal and without making a deposit or executing a bond for costs, because of his poverty as alleged in said affidavit, filed. Matthews, J. Notice of Appeal, filed.

Oct. 17 No. 1:—Willie Lee Stewart: Letter from Curtis Reid, Resident Superintendent of the District of Columbia Jail acknowledging receipt of the two certified copies of the Judgment and Commitment ordering the Execution of the defendant on January 6, 1956, filed.

Oct. 28 No. 1:—Willie Lee Stewart: Transcript of Proceedings: Pages 1-4, October 7, 1955, filed. (Atty's. Copy) (Reporter-Deeds) (see entry of 11-18-55)

[fol. 9]

Nov. 1 No. 1: Willie Lee Stewart: Designation of Record, filed. Cert. of Serv.

Nov. 2 No. 1: Willie Lee Stewart: Transcript of Proceedings; (see entry of 11-18-55) Pages 1-4, Friday, October 7, 1955, filed. (Clks. Copy and Asst. U.S. Atty's Copy—F. G. Smithson) (Reporter-Deeds)

Nov. 3 No. 1: Certified copy of Order from the U.S. Court of Appeals for the District of Columbia Circuit ordering that the transcript of record heretofore certified to the U.S. Court of Appeals by the Clerk of the U.S. District Court in Case No. 12,586 may be included by reference in the certificate of the U.S. District Court covering the record on Appeal, filed. dated—November 1, 1955.

Nov. 16 No. 1: Counterdesignation of Record, filed. Cert. of Serv.

Nov. 18 No. 1: Transcript of Proceedings returned to Atty. John C. Croghan and F. G. Smithson, Asst. U.S. Atty.

Nov. 21 No. 1: Record on Appeal delivered to U.S. Court of Appeals for John A. Croghan, Atty. in Forma Pauperis. (Clks. Fee \$8.58)

1955

## Proceedings

Dec. 22 No. 1: Order setting new date of execution to take effect on the 2nd Day of March, 1956, filed. Matthews, J. (N)

Dec. 27 No. 1: Letter from Curtis Reid, Resident Superintendent, District of Columbia Jail acknowledging receipt of two certified copies of the Order setting new Date of Execution for March 2, 1956 and further provides that if the Appeal now pending is not determined by that date that the sentence of death shall be stayed pending such determination, filed.

1956

Oct. 29 No. 1: Order Appointing Stanley Dietz as counsel to defend, filed. Holtzoff, J.

Nov. 2 No. 1: Appearance of Stanley M. Dietz entered.

1957

May 8 No. 1: Mandate from the U.S. Court of Appeals for the District of Columbia Circuit Reversing and Remanding the case to the District Court with directions to award a new trial, filed. Dated 4-18-57.

May 15 No. 1: Certified copy of Judgment of U.S. Court of Appeals Reversing Judgment of U.S. District Court, Presented. Laws, C. J. (Reporter-O'Neal)

[fol. 10] 1957

May 17 No. 1: Motion of John Alvin Croghan to withdrawn as counsel, filed, heard, and Granted; Appearance of John Alvin Croghan as attorney for deft. entered Withdrawn per praecipe, filed. (Fiat) Laws, C. J. Case is referred for appointment of counsel. Trial date set for 6-24-57. Attorney John Alvin Croghan present. Laws, C. J. (Reporter-O'Neal)

May 20 No. 1: Order Vacating the appointment of Stanley Dietz; and further appointing Belford V. Lawson as counsel to defend, filed. Laws, C. J. (N)

Jun. 4 No. 1: Order Appointing Charles Duncan as counsel to defend, filed. Laws, C. J. (N)

Jun. 6 No. 1: Capital List of Jurors served personally on Deft. at D.C. Jail on 6-5-57, filed.

1957

## Proceedings

Jun. 10 No. 1: Capital List of additional Witnesses served personally on Deft. at D.C. Jail on 6-7-57, filed.

Jun. 13 No. 1: Letter from the U.S. Court of Appeals returning the record on appeal containing the District Court's file copy of the reporter's Transcript of Proceedings or portions thereof, filed. Receipt acknowledged. (Record in File Room)

Oct. 8 No. 1: Capital List of Jurors served personally 10-2-57 on Deft. at D.C. Jail, filed.

Oct. 14 No. 1: Motion for determination of Mental Competency and Point & Authorities in support thereof, filed. Cert. of Serv.

Oct. 24 No. 1: Willie Lee Stewart: Order Committing defendant to St. Elizabeths Hospital for a period of Sixty (60) Days; if defendant is of sound mind he is to be returned to the District of Columbia Jail to await trial; if defendant is of Unsound mind he is to remain at St. Elizabeths Hospital pending further proceedings, filed. Letts, J.

Oct. 25 No. 1:—Willie Lee Stewart: Motion of Defendant to dismiss Court appointed counsel and appoint new counsel, filed. (by def.)

1958

Feb. 18 No.1: Willie Lee Stewart: Order Extending Commitment of Defendant for a period of Sixty (60) Days from this date, filed. Laws, C. J. (N)

[fol. 11]

Apr. 16 No. 1: Letter from Winfred Overholser, M.D., St. Elizabeths Hospital advising that deft. is mentally competent to understand the proceedings and to assist in his own defense, filed.

Apr. 25 No. 1: Motion of Defendant to dismiss Court appointed counsel and appoint new counsel, Granted: Attorneys B. V. Lawson and C. Duncan present. Tamm, J. (Reporter-Sanche) Cert. Filed.

Apr. 29 No. 1: Order Vacating the appointments of Belford V. Lawson and Charles Duncan as counsel to defend and appointing Edward L. Carey as counsel to defend, filed. Tamm, J. (N)



1958

## Proceedings

May 1 No. 1: Order Appointing Robert Ackerly as counsel to defend, filed. Tamm, J. (N)

Jun. 5 No. 1: Petition of Defendant for further Mental Examination and hearing on the determination of defendant's mental competency, filed. Cert. of Serv.

Jun. 6 No. 1: Capital List of Jurors served on defendant at the D.C. Jail on June 4, 1958, filed.

Jun. 13 No. 1—Willie Lee Stewart: Petition for further Mental Examination and hearing on determination of defendant's Mental Competency heard, argued and Granted. (Order to be presented) Attorneys Edward L. Carey and Robert Ackerly present. Tamm, J. (Reporter-Sanche)

Jun. 13 No. 1: Opposition of Government to Deft's. motion for further Mental Examination and Affidavit of William C. Ballinger, filed. Cert. of Serv.

Jul. 1 No. 1: Willie Lee Stewart: Order committing defendant to D.C. General Hospital for further Mental Examination, filed Tamm, J.

Aug. 22 No. 1: Willie Lee Stewart: Letter from James A. Ryan, M.D., D.C. General Hospital stating Deft. is sane, competent and capable of participating in his own defense, filed.

Sep. 30 No. 1: Willie Lee Stewart: Oral Motion of Defendant for continuance heard, argued and Granted. Defendant not present. Letts, J. (Reporter-Markwalter)

Oct. 13 No. 1: Willie Lee Stewart: Capital List of Jurors served on Defendant at D.C. Jail Personally 10-8-58, filed.

[fol. 12]

Oct. 21 No. 1: Motion of Defendant for issuance of subpoenas pursuant to Rule 17 B, filed. Cert. of Serv.

Oct. 21 No. 1: Supplemental Memorandum in support of Deft's. motion for hearing on determination of Deft's Mental Competency, Filed, Cert. of Serv.

Oct. 23. No. 1—Willie Lee Stewart: Order Granting Defendant's Motion for issuance of subpoenas at the expense of the United States, filed. Holtzoff, J.

Oct. 27 No. 1: Order that Mary V. McIndoo, Psychiatrist, D.C. General Hospital make a mental examination

1958

## Proceedings

and file a written report with this Court no later than 10 A.M. 10-28-58 stating if at present the defendant is of sound mind and able to understand the nature of the proceedings against him and properly to assist in his own defense, filed. Letts, J.

Oct. 28 No. 1—Willie Lee Stewart: Motion of Defendant for Judicial determination of Mental Competency to stand trial Begun; and Respited until 10-29-58 at 10:00 a.m.; Defendant Remanded to the District of Columbia Jail; Attorneys Edward Carey and Robert Ackerly present. Letts, J. (Reporter-Romig & Byrholdt) Cert. filed.

Oct. 29 No. 1—Willie Lee Stewart: Hearing to determine Mental Competency Resumed; Finding by Court: Defendant Mentally Competent to Stand Trial; (Order to be presented); Trial continued to 11-12-58 at request of deft.; Defendant Remanded to the D.C. Jail; Motion of Deft. for issuance of subpoenas, filed. Order for issuance of subpoenas at Government Expense, filed. Attorney Robert Ackerly present. Letts, J. (Reporter-Romig) Cert. filed.

Oct. 30 No. 1—Willie Lee Stewart: Order that Court Reporter furnish Transcript of Proceedings of 10-28-58 and 10-29-58 and daily transcript of trial 11-12-58 to deft. at Government Expense, filed. Letts, J.

Oct. 30 No. 1—Willie Lee Stewart: Order stating that the Defendant shall stand trial on the charges contained in the indictment against him on November 12, 1958, and that the defendant is determined to be of sound mind, that is, able to understand the nature of the proceedings against him and to assist properly in his own defense, filed. Letts, J.

[fol. 13]

Nov. 12 No. 1—Willie Lee Stewart: Trial continued until 11-14-58 at 10:00 a.m. due to previous commitment of Court; Defendant Remanded to the District of Columbia Jail; Attachment for contempt issued for Edith Honigman Burka at request of the Government returned executed; witness having purged herself is released by the Court to return on 11-14-58 at 1:45 P.M., filed. Attorneys Edward



Carey and Robert Ackerly present. Letts, J. (Reporter-Romig & I. Watson)

Nov. 14 No. 1—Willie Lee Stewart: Jurors from Criminal Courts 1-5 Sworn on Voir Dire: Jury and Four Alternate Jurors Sworn: Mrs. Audrey W. Farr, Miss Iona Browne, Garnett M. Barnett, Miss Margaret Dixon, Harvey L. Boyers, Mrs. Dorothy Wagner, Miss Pauline Baylor, Moses M. Robinson, Miss Bernice Ferris, David L. Ford, Mrs. Anne Dorsch, Mrs. Mary Facciolo.

a.1. Mrs. Elizabeth Linthicum, a.2. Miss Carrie Hall, a.3. Miss Florence Hafelfinger, a.4. Frank J. Mischou.

Case is Respited until 11-17-58 at 10:00 a.m.; Defendant Remanded to the D.C. Jail; Motion of Defendant for Daily Transcript (in re order of 10-29-58) c/s, filed. Transcript of Proceedings of 10-28-58, 10-29-58, Pages 1-172, filed. Attorneys Edward Carey and Robert Ackerly present. Letts, J. (Reporter-Kaitz & Williamson)

Nov. 18 No. 1: Trial Resumed; same jury and Alternate Jurors; Case Respited until 11-19-58 at 10:00 A.M.; defendant Remanded to the D.C. Jail; Transcript of Proceedings of 11-14-58, Pages 1-95, filed. Reporter-Romig; Attorneys Edward Carey and Robert Ackerly present. Letts, J. (Reporter-Watson, Romig and Byrholdt) Cert. filed.

Nov. 19 No. 1—Willie Lee Stewart: Trial Resumed; same jury and alternate jurors; Case is Respited until 11-20-58 at 10:00 a.m.; Defendant Remanded to the District of Columbia Jail; Attorneys Edward Carey and Robert Ackerly present. Letts, J. (Reporter-I. Watson, E. Romig and K. Byrholdt) Cert. filed.

Nov. 20 No. 1—Willie Lee Stewart: Trial Resumed; same jury and alternate jurors; Case is Respited until 11-24-58 at 10:00 a.m.; Defendant Remanded to the District of Columbia Jail; Attorneys Edward Carey and Robert Ackerly present.

[fol. 14]

Nov. 20 Letts, J. (Reporter-Romig, Deeds and Byrholdt) Transcript of Proceedings of 11-18-58 Pages 96-264, filed. (Reported-Watson, Romig and Byrholdt)

1958

## Proceedings

Nov. 24 No. 1—Willie Lee Stewart: Trial Resumed; same jury and alternate jurors; case is Respited until 11-25-58 at 10:00 a.m.; Defendant Remanded to the D.C. Jail; Attorneys Robert Ackerly and Edward Carey present. Letts, J. (Reporter-Romig, Byrholdt, Watson & Kaitz) cert. filed.

Nov. 25 No. 1—Willie Lee Stewart: Trial Resumed; same jury and alternate jurors; Alternate jurors discharged; Jury Retires to Consider Their Verdict; Verdict: Guilty as charged; Jury Polled; Transcript of Proceedings of 11-20-58, filed. (Reporter-Romig) Defendant Remanded to the D.C. Jail; Attorneys Robert Ackerly and Edward Carey present. Defendant's requested prayers 1-7, filed. Letts, J. (Reporter-Romig, Byrholdt & Kaitz)

Dec. 1 No. 1: Transcript of Proceedings, Pages 265-448, Nov. 19, 1958; Pages 609-760, Nov. 24, 1958; Pages 761-885, Nov. 25, 1958, filed. Clerk's Copy. (Reporter-Romig)

Dec. 2 No. 1: Motion of Defendant for a New Trial, filed. Cert. of Serv.

Dec. 9 No. 1: Opposition of Government to Defendant's motion for a New Trial, filed. Cert. of Serv.

Dec. 19 No. 1: Motion of Defendant for a New Trial heard and Denied. Oral Motion for leave to appeal in Forma Pauperis, Granted; (Order to be presented) Attorneys Ed Carey and Bob Ackerly present. Letts, J. (Reporter-Romig)

1959

Jan 23 No. 1: Willie Lee Stewart: Sentenced to Death by Electrocution on April 24, 1959. Judgment & Commitment, filed. Attorneys Edward L. Carey and Robert L. Ackerly present. Letts, J. (Reporter-Copeland) (N)

[fol. 15]

Jan. 27 No. 1: Letter from Curtis Reid, Superintendent, D.C. Jail acknowledging receipt of 3 copies of Order of Judgment and Commitment, filed.

Jan. 30 No. 1—Willie Lee Stewart: Order Authorizing Defendant to proceed on Appeal in Forma Pauperis and without Prepayment of Costs, filed.

## IN UNITED STATES DISTRICT COURT

INDICTMENT—Filed April 13, 1953

The Grand Jury charges:

On or about March 12, 1953, within the District of Columbia, Willie Lee Stewart did perpetrate a robbery by force and violence and against resistance, and by sudden and stealthy seizure and snatching and by putting in fear, and did steal, take and carry away, off the person and from the immediate actual possession of Harry Honikman, \$416.07 in money, the property of Harry Honikman; and while perpetrating the robbery in the manner aforesaid, unlawfully and feloniously did kill and murder the said Harry Honikman by means of shooting him with a pistol, of which shooting Harry Honikman, on March 12, 1953, did die.

Count Two:

That on or about March 12, 1953, within the District of Columbia, Willie Lee Stewart by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, did steal, take and carry away, off the person and from the immediate and actual possession of Harry Honikman, property of Harry Honikman of the value of \$416.07 in money.

Count Three:

On or about March 12, 1953, within the District of Columbia, Willie Lee Stewart did perpetrate a robbery by force and violence and against resistance, and by sudden and stealthy seizure and snatching and by putting in fear, and did steal, take and carry away, off the person and from the immediate actual possession on Harry Honikman, \$416.07 in money, the property of Harry Honikman; and while perpetrating the robbery in the manner aforesaid, unlawfully and feloniously did kill and murder the said Harry Honikman by means of shooting him with a pistol, of which shooting Harry Honikman, on March 12, 1953, did die; that on or about March 12, 1953, within the District of Columbia, Annie Lee Stewart, well knowing that the said Willie Lee Stewart had robbed and mur-

dered the said Harry Honikman as hereinbefore alleged, did feloniously and willfully give comfort, aid and assistance to the said Willie Lee Stewart, with the intent thereby to thwart the lawful arrest, prosecution and conviction of the said Willie Lee Stewart.

**Count Four:**

On or about March 12, 1953, within the District of Columbia, Willie Lee Stewart did perpetrate a robbery by force and violence and against resistance, and by sudden and stealthy seizure and snatching and by putting in fear, and did steal, take and carry away, off the person and from the immediate actual possession of Harry Honikman, \$416.07 in money, the property of Harry Honikman; and while perpetrating the robbery in the manner aforesaid, unlawfully and feloniously did kill and murder the said Harry Honikman by means of shooting him with a pistol, of which shooting Harry Honikman, on March 12, 1953, did die; that on or about March 12, 1953, within the District of Columbia, Willis Daniels, well knowing that the said Willie Lee Stewart had robbed and murdered the said Harry Honikman as hereinbefore alleged, did feloniously and willfully give comfort, aid and assistance to the said Willie Lee Stewart and with the intent thereby to thwart the lawful arrest, prosecution and conviction of the said Willie Lee Stewart.

/s/ Charles M. Irelan, Attorney of the United States  
in and for the District of Columbia.

**A True Bill.**

/s/ Ferdinand E. Walter, Foreman.

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**IN UNITED STATES DISTRICT COURT**

**PLEA OF DEFENDANT—Filed April 21, 1953**

On this 17th day of April, 1953, the defendants: Willie [fol. 17] Lee Stewart, Annie Lee Stewart, and Willis Daniels, appearing in proper person and by their attorney Foster Wood, Esquire, being arraigned in open Court

upon the indictment, the Indictment being Read to them, pleads Not Guilty thereto.

#1/ The defendant is remanded to the District of Columbia Jail.

Each: The defendant is granted ten (10) days in which to file such motions as he may be advised.

By direction of Henry A. Schweinhaut, Presiding Judge, Criminal Court #One, Harry M. Hull, Clerk, By /s/ Paul A. Roser, Deputy Clerk.

Present: United States Attorney, By Victor Caputy, Asst. U.S. Attorney.

#### IN UNITED STATES DISTRICT COURT

#### ORDER FOR MENTAL EXAMINATION—October 24, 1957

Upon consideration of the motion of counsel for the defendant herein, and there being no objection thereto on behalf of the Government, it is, this 24th day of October, 1957,

Ordered, that the defendant, Willie Lee Stewart, be committed to Saint Elizabeths Hospital, Washington, D.C., pursuant to D.C. Code, § 24-301, as amended, for a period of sixty days; and it is further

Ordered, that the Superintendent of that institution shall cause the defendant to be examined pursuant to the aforementioned section and shall under a report to the Court which shall state the opinion of the appropriate official or officials of that institution as to whether or not the defendant is presently of sound mind and is able to understand the nature of the charges against him and assist in the preparation of his defense; and it is further

[fol 18] Ordered, that upon report of the Superintendent to the Clerk of this Court that the defendant is of sound mind, and able to understand the nature of the charges against him and assist in the preparation of his own defense, if that be his finding, the United States Marshal for the District of Columbia shall transport the defendant to the District of Columbia Jail to await further proceedings herein; and it is further

Ordered, that if the defendant be found and reported to be of unsound mind he shall remain at Saint Elizabeths Hospital pending proceedings regarding his commitment.

/s/ F. Dickinson Letts, Judge.

No Objection: /s/ F. G. Smithson, Asst. U.S. Attorney.

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IN UNITED STATES DISTRICT COURT

ORDER ENLARGING TIME FOR MENTAL REPORT—February 18,  
1958

Upon consideration of the order of this Court committing the defendant to Saint Elizabeths Hospital for a mental examination, and upon consideration of the oral representation made to the Court by the United States Attorney that the Superintendent of Saint Elizabeths Hospital desires more time to complete the examination of this defendant and to continue close scrutiny of his daily behavior in order to more accurately determine the required opinion of whether or not the defendant understands the nature of the charges against him and is able to properly assist counsel in his own defense, it is this 18th day of February 1958,

Ordered that the commitment of said defendant shall be extended for 60 days from the date of this order.

/s/ Bolitha J. Laws, Judge.



[fol. 19] IN UNITED STATES DISTRICT COURT

REPORT OF DEFENDANTS MENTAL CONDITION—Filed April 16,  
1958

Department of Health, Education, and Welfare, Saint  
Elizabeths Hospital, Washington 20, D. C.

Re: Willie L. Stewart

April 14, 1958.

The Clerk, Criminal Division, United States District Court,  
for the District of Columbia, United States Courthouse,  
Washington 1, D.C.

DEAR SIR:

Mr. Willie L. Stewart (Criminal Numbers 631-53, 632-53, and 633-53) was committed to Saint Elizabeths Hospital December 16, 1957 for a period of not to exceed sixty days, upon an order signed by Judge F. Dickinson Letts, to be examined by the psychiatric staff of this hospital. It was further ordered that a written report of our findings be submitted to the Court as to the present sanity or mental competency of Willie L. Stewart to stand trial. A subsequent order extending this commitment for an additional period of sixty days was issued by Chief Judge Bolitha J. Laws.

Mr. Stewart's case has been studied intensively since the date of his admission to Saint Elizabeths Hospital and he has been examined by several qualified psychiatrists attached to the medical staff of Saint Elizabeths Hospital as to his mental condition. On February 3, 1958 and April 14, 1958, Mr. Stewart was examined and the case reviewed in detail at medical staff conferences. We conclude, as the result of our examinations and observation, that Willie L. Stewart is mentally competent to understand the proceedings against him and to properly assist in his own defense.

Sincerely yours, /s/ Winfred Overholser, M.D. Superintendent.

[fol. 20] IN UNITED STATES DISTRICT COURT

PETITION FOR FURTHER MENTAL EXAMINATION AND HEARING  
ON THE DETERMINATION OF DEFENDANT'S MENTAL COM-  
PETENCY—Filed June 5, 1958

This petition is filed on behalf of the defendant, Willie Lee Stewart, by his court appointed counsel, pursuant to provisions of 18 U.S.C., Section 4244, for the purpose of requesting that the court order a further mental examination of the defendant and following that conduct a hearing for the purpose of determining whether the defendant is presently of unsound mind and whether or not he is able to understand the nature of the charges against him and to effectively assist counsel in the preparation of his defense.

This defendant has twice been tried in the United States District Court for the District of Columbia on a charge of first degree murder and has been convicted on each occasion. Each conviction has been reversed by the United States Court of Appeals for the District of Columbia. The defendant has been held in the District of Columbia jail for a period of five years and during part of this time he has been under the sentence of death imposed following his convictions in this court.

Petitioners have talked with the defendant concerning the charge against him and for the purpose of preparing his defense. It is the opinion of petitioners that this defendant does not understand the nature of the charges against him and has not been able to assist counsel at all in the preparation of his defense.

• The defendant was committed to St. Elizabeth's Hospital pursuant to a similar petition filed on his behalf by a former counsel for the defendant under an order signed by this court on October 24, 1957. Thereafter, the defendant was transferred to St. Elizabeth's Hospital for a period of sixty (60) days. Following this sixty-day period the hospital authorities requested an additional sixty days to examine the defendant which extension was granted by Judge Laws by Order dated February 18, 1958. The hos-  
[fol. 21] pital authorities requested additional time to complete their examination of the defendant as stated in the letter filed herein for the purpose of continuing close scru-



tiny of the defendant's daily behavior in order to more accurately determine the mental condition of the defendant. Counsel for defendant have talked with Dr. Cushard who was in charge of the examination of the defendant at St. Elizabeth's Hospital. It is Dr. Cushard's opinion as related to counsel that the defendant is of sound mind and is a malingerer. It is significant that at the two trials of this defendant it was conflicting psychiatric testimony as to whether the defendant was of sound mind at the time the crime was committed. It is also significant that the hospital authorities at St. Elizabeth's Hospital could not form a determination of the defendant's mental capacity in sixty days which is usually ample but requested an additional sixty days for further examination.

In view of the serious nature of the charge and the fact that this defendant has been convicted on two occasions of first degree murder and sentenced to death, it is submitted that an additional examination of this defendant, perhaps by doctors at the District of Columbia Municipal Hospital or private physicians at the expense of the government, should be conducted and that following their reports this court require that both the doctors at St. Elizabeth's and the doctors to be appointed by this court to appear in court and testify and be subject to cross-examination for the purpose of permitting the court to make a judicial determination of the defendant's mental competency at this time.

Counsel for the defendant believes on the basis of their interviews with the defendant that he is not capable of assisting in the preparation of his defense and that he does not understand the nature of the charges against him nor the possible consequences of a conviction on this charge. The defendant has denied to counsel that he has ever been tried for these charges, although the records indicate that he has twice been tried in this court and sentenced to death.

[fol. 22] The government could not be prejudiced by this request to have additional mental examinations of this defendant and as this court is well aware, many times reputable psychiatrists take a different view of the mental condition of an individual based upon their own examination. The defendant is precluded from having this examination at the present time because of his poverty, therefore, in

view of the serious nature of the charges against this defendant, it is respectfully submitted that this court should order an additional mental examination of the defendant by doctors other than those at St. Elizabeth's Hospital and that a hearing then be held to determine the mental competency of the accused to determine whether or not the defendant is of unsound mind at the present time and whether or not he is able to understand the nature of the charges against him and to assist effectively in the preparation of his defense.

Respectfully submitted, /s/ Edward L. Carey, /s/  
Robert L. Ackerly.

Service Acknowledged: June 5, 1958.

/s/Oliver Gasch, United States Attorney.

[fol. 23] IN UNITED STATES DISTRICT COURT

ORDER FOR MENTAL EXAMINATION—July 1, 1958

Upon consideration of the Petition of defendant by and through his counsel of record for a further mental examination of the defendant and the opposition of the Government thereto, it is by the Court this 1st day of July, 1958, Ordered, That the defendant, Willie Lee Stewart, be committed to the District of Columbia General Hospital pursuant to the provisions of Title 24, D.C. Code, Section 301, as amended, for a period of 60 days; and it is further

Ordered, That the Chief Psychiatrist of said hospital shall cause an examination to be made of the defendant and shall render report to the Court of the results of said examination; said examination shall be made for the purpose of determining whether or not the defendant is presently of sound mind and is able to understand the nature of the charges pending against him and whether the defendant is able to effectively assist counsel in the preparation of his defense; and it is further

Ordered, That if the report of the Chief Psychiatrist to the Court shall be that the defendant is of sound mind, able to understand the nature of the charges pending against him and to effectively assist counsel in the prepa-

ration of his own defense, then the United States Marshal for the District of Columbia shall transport the defendant to the District of Columbia jail to await further proceedings herein; and it is further

Ordered, That if the defendant be found and reported by said Chief Psychiatrist to be of unsound mind or not able to understand the nature of the proceedings against him or not able to effectively assist counsel in the preparation of his defense, he shall remain in said hospital pending further proceedings in this Court.

/s/ Edward A. Tamm, Judge.

Seen: F. G. Smithson /s/ Asst. U. S. Attorney.

[fol. 24] IN UNITED STATES DISTRICT COURT

REPORT ON DEFENDANT'S MENTAL CONDITION—Filed August 22, 1958

Government of the District of Columbia, D. C. General Hospital, Washington 3, D. C.

August 20, 1958.

Mr. Harry M. Hull, Clerk Criminal Division, U. S. District Court for the District of Columbia, 3rd & Constitution Ave. N. W., Washington, D. C.

DEAR SIR:

This patient was admitted to District of Columbia General Hospital July 3, 1958.

Psychiatric examination reveals Mr. Stewart to be sane, competent and capable of participating in his own defense.

He may be returned to Court at any time.

Sincerely yours, /s/ James A. Ryan, M. D., Assistant Chief Psychiatrist.

John D. Schultz, M. D., Chief Psychiatrist.

## IN UNITED STATES DISTRICT COURT

ORDER DIRECTING FURTHER MENTAL EXAMINATION—October 27, 1958

Upon consideration of the motion of the defense counsel in the above-entitled case wherein the defendant is charged with first degree murder,

And upon consideration of the purported testimony of Dr. E. Y. Williams, psychiatrist, Howard University, who has stated that the defendant is presently of unsound mind, and is so mentally incompetent as to be unable to understand the proceedings against him or to properly assist counsel in his own defense it is

Ordered, that Dr. Mary V. McIndoo, psychiatrist, D. C. General Hospital, who has previously examined the defendant on August 20, 1950, make a mental examination, and it is

[fol. 25] Further Ordered, that Dr. McIndoo file a written report with this Court no later than 10 A. M. October 28, 1958, stating if at present the defendant is, in her opinion, presently of sound mind and able to understand the nature of the proceedings against him and properly to assist in his own defense.

/s/ F. Dickinson Letts, Judge, United States District Court.

Dated: October 27, 1958.

## IN UNITED STATES DISTRICT COURT

ORDER RE TRANSCRIPT—October 30, 1958

Upon consideration of the Motion of the defendant that he be furnished with a daily copy of the transcript of proceedings of the trial in the above case and the proceedings which were held on October 28, and 29, 1958, in the above case and it appearing to the Court that the defendant is proceeding in forma pauperis and that the indictment charges murder in the first degree and the Court being satisfied that the defendant is without funds to purchase said transcript,

It is by the Court this 30th day of October, 1958,  
Ordered:

That the Court reporter be and she is hereby directed to furnish to said defendant a copy of the transcript of proceedings in the above cause held on October 28 and 29, 1958, and a daily copy of the transcript of the trial now set for November 12, 1958; and,

That the cost of said transcripts be paid by the Administrative Office of the United States Courts, in accordance with Bulletin 320 and Title 28 of the United States Code, Section 753 (b) and (f) as amended.

/s/ F. Dickinson Letts, Judge.

No Objection: F. G. Smithson /s/ Asst. United States Attorney.

[fol. 26] IN UNITED STATES DISTRICT COURT

ORDER RE DEFENDANT'S MENTAL CAPACITY—October 30, 1958

Upon consideration of the motion filed on behalf of the defendant, pursuant to 24 D. C. Code, Sec. 301, as amended, seeking a judicial determination of his mental competency to stand trial, that is, a determination whether or not the defendant is presently of sound mind, capable of understanding the nature of the charges against him and of properly assisting counsel in his own defense.

And upon consideration of the opposition filed thereto on behalf of the government,

And upon consideration of the testimony elicited during the course of a hearing on said motion which was ordered by this Court, the following facts are determined:

1. That the defendant is presently of sound mind, i.e., able to understand the proceedings against him and properly to assist in his own defense;
2. That the defendant is malingering.

Therefore, it is this 30th day of October 1958,

Ordered that the defendant shall stand trial on the charges contained in the indictment against him on November 12, 1958, and that the defendant is determined to

be of sound mind, that is, able to understand the nature of the proceedings against him and to assist properly in his own defense.

/s/ F. Dickinson Letts, Judge.

IN UNITED STATES DISTRICT COURT

RECITAL RE TRIAL AND VERDICT

On this 25th day of November 1958 came again the parties aforesaid in manner as aforesaid and the same jury as aforesaid in this cause, the hearing of which was respite yesterday; whereupon after hearing further of the evidence, arguments of counsel and charge of the Court, the alternates are discharged and the jury retires to consider their verdict; and thereupon the said jury returns into open [fol: 27] Court and upon their oath say that they find the defendant guilty as charged; and thereupon the jury is polled and each and every member say that they find the defendant guilty as charged.

The defendant is remanded to the District Jail.

By direction of F. Dickinson Letts, Presiding Judge,  
Criminal Court #2, Harry M. Hull, Clerk By  
/s/ Wm. Collins, Deputy Clerk.

Present: United States Attorney, By Fred Smithson,  
Asst. U.S. Attorney.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S REQUESTS FOR INSTRUCTIONS—Filed Nov. 25,  
1958

DEFENDANT'S REQUEST FOR INSTRUCTION No. 1

You are instructed that if you are convinced beyond a reasonable doubt that the defendant was not suffering from a diseased or defective mental condition at the time that he committed the robbery with which he is charged, then you may find him guilty. However, unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition or that the act was not the product of such abnormality,



you must find the defendant not guilty by reason of insanity. You are instructed that a person charged with crime is not criminally responsible if his unlawful act was the product of a mental disease or mental defect.

*Durham v. United States*, 1954, 214 F.2d. 862.

[Denied—F.D.L.]

#### DEFENDANT'S REQUEST FOR INSTRUCTION No. 2

You are instructed that if you find that the defendant was suffering from a mental disorder or defect not amount- [fol. 28] ing to insanity at the time of the commission of this crime thus not sufficient to excuse him from criminal responsibility under the test that I have already given you and if you find that such mental disorder or defect deprived him of the ability to form the intent to commit a robbery, then in that event you may find him guilty of murder in the second degree.

*Stewart v. United States*, 1954, 214 F.2d. 879.

[Denied—F.D.L.]

#### DEFENDANT'S REQUEST FOR INSTRUCTION No. 3

You are instructed that the crime of murder in the first degree with which the defendant is charged is defined as follows:

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting or perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or attempting to perpetrate any arson . . . rape, mayhem, robbery or kidnapping or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon is guilty of murder in the first degree.

You must, therefore, be convinced beyond a reasonable doubt that the defendant was at the time that this crime

was committed of sound memory and discretion. If you believe beyond a reasonable doubt from the evidence that the defendant committed a homicide with which he is charged, but if you believe that he was at that time suffering from a mental disorder or mental defect not amounting to insanity but sufficient to deprive him of the necessary sound memory and discretion as required by law for murder in the first degree, then you may find him guilty of murder in the second degree.

*Stewart v. United States*, 1954, 214 F.2d. 879.

[Denied—F.D.L.]

[fol. 29] DEFENDANT'S REQUEST FOR INSTRUCTION No. 4

You are instructed that since the sanity of the defendant is in issue the government must prove beyond a reasonable doubt as one of the necessary elements of this prosecution that the defendant was at the time this crime was committed sane and not suffering from any mental disease or mental defect. If you are convinced beyond a reasonable doubt that the defendant committed the homicide with which he is charged and if you find from the evidence that the defendant was suffering from a mental disorder or mental defect not amounting to insanity, you may apply the principle of diminished responsibility for a criminal act of one who is suffering from a mental disorder or mental defect short of insanity and find the defendant guilty of murder in the second degree.

*Stewart v. United States*, 1954, 214 F.2d. 879.

[Denied—F.D.L.]

DEFENDANT'S REQUEST FOR INSTRUCTION No. 5

You are instructed that if you find that the commission of this crime was the product of a mental disease or mental defect suffered by the defendant at the time the crime was committed, you must find the defendant not guilty by reason of insanity. If your verdict is that the defendant is not guilty by reason of sanity, the defendant will be confined in a hospital for the mentally ill until the super-



intendent of that hospital has certified and the Court is satisfied that this defendant has recovered his sanity and will not in the reasonably foreseeable future be dangerous to himself or others. Before the defendant can be released from the hospital, the superintendent of the hospital and the Court must be satisfied that the defendant is free from such abnormal mental condition as would make him dangerous to himself or the community in the reasonably foreseeable future. Thus, even if the defendant's mental health should improve in the future, if there remains an [fol. 30] abnormal mental condition which is certified as a source of potential danger, he will be confined in the hospital and retained in custody as long as this condition exists.

*Catlin v. United States*, 1957, 102 U.S. App. D.C. 127, 251 F.2d. 368.

*Overholser v. Leach*, 1958, 14,480, CADC, (Opinion amended by order filed September 18, 1958).

[Denied—Given in Substance—F.D.L.]

#### DEFENDANT'S REQUEST FOR INSTRUCTION No. 6

You are instructed that before you can find the defendant guilty as charged in the indictment, you must be satisfied beyond a reasonable doubt that the evidence establishes each and every element of the crime with which he is charged. Murder in the first degree requires that the person accused be of sound memory and discretion at the time the crime was committed. There has been evidence that the defendant was suffering from a mental disease or mental defect at the time that the crime was committed. You must believe, therefore, beyond a reasonable doubt from all the evidence that the defendant was not suffering from a mental disease or mental defect which deprived him of his sound memory and discretion at the time the crime was committed before you may find him guilty as charged. If you find that this unlawful act was the product of a mental disease or mental defect, then you must find the defendant not guilty by reason of insanity. If you find from the evidence that the defendant was suffering

from a mental disease or a mental defect not sufficient to establish insanity at the time of the commission of this unlawful act, but you find that such mental disorder or mental defect deprived him of the sound memory and discretion required by law for murder in the first degree, you may find him guilty of murder in the second degree.

*Stewart v. United States*, 1954, 214 F.2d 879.

[Denied—F.D.L.]

[fol. 31] DEFENDANT'S REQUEST FOR INSTRUCTION No. 7

You are instructed that there are two factors in this defense, (1) a mental disease or mental defect and (2) a direct relationship between that disease and the alleged criminal act.

If the disease produces a mental derangement of such character as necessarily to influence the accused's every action, there is no further problem. The problem we face comes from illness of lesser scope, what the authorities of a century ago called "partial insanity."

A bit of underlying philosophy and history is helpful. A common-law crime consists of an act and a vicious mind prompting the act. The basic import of the criminal law is punishment for a vicious will which motivates a criminal act. To understand the defense of insanity one must keep constantly and clearly in mind the basic postulate of our criminal law—"a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." If in the doing of the act a man is not a free agent, or not making a choice, or unknowing of the difference between right and wrong, or not choosing freely, or not acting freely, he is outside the postulate of the law of punishment. An insane man is not held responsible, because he has not a criminal mind in respect to the act he committed. Experience and science have, of course, caused us long ago to reject the idea that exculpation is only for the individual who is indeed "without mind;" like a wild beast.

When we say the defense of insanity requires that the act be a "product of" a disease, we do not mean that it must be a direct emission, or a proximate creation, or an

immediate issue of the disease in the sense, for example, of Hadfield's delusion that the Almighty had directed him to shoot George III. We do not mean to restrict this defense to such cases; many mental diseases so affect areas of the mind that some or all of the mental elements requisite to criminal liability under the law are lacking.

*Carter v. United States*, 102 U.S. App. D.C. 227.

[Denied—F.D.L.]

[fol. 32] IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL AND DENIAL THEREOF

The defendant moves that the Court grant a new trial in the above case for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the government's case and at the conclusion of the evidence.

2. The Court erred in permitting testimony of the witness Clarke to be read into the record over defendant's objection.

3. The Court erred in permitting the attorney for the government to continually use leading questions in examining witnesses over the objection of the defendant, thus denying defendant a fair trial.

4. The Court erred in permitting the attorney for the government to ask the defendant whether he had taken the stand in any other proceedings and in refusing to grant defendant's motion for mistrial on the basis of this question.

5. The defendant was substantially prejudiced and deprived of a fair trial by the testimony of the witnesses, Cushard, Jones and McIndoo whose testimony related only to the defendant's competence to stand trial, an issue which had been determined by the Court in advance of trial, and which had no bearing on defendant's guilt or innocence.

6. The Court erred in charging the jury and in refusing to charge the jury as requested by the defendant.

7. The Court erred in denying defendant's several motions for a mistrial.

8. And for such other and further reasons as may be brought to the attention of the Court on the hearing of this motion.

Wherefore, the defendant moves that the Court grant a new trial in the above proceeding.

/s/ Edward L. Carey, /s/ Robert L. Ackerly, Attorneys for Defendant.

[fol. 33] [Filed December 19, 1958]

On this 19th day of December, 1958, came the attorney of the United States, the defendant in proper person and by counsel, Edward Carey and Robert Ackerly, Esquire; whereupon consideration of the motion for a new trial, the same is by the Court denied.

The defendant is remanded to the D.C. Jail.

By direction of F. Dickinson Letts, Presiding Judge,  
Criminal Court #2, Harry M. Hall, Clerk By  
/s/ Wm. R. Harper, Deputy Clerk.

Present: United States Attorney, By Frederick Smithson, Asst. U.S. Attorney.

# IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT—January 23, 1959

On this 23rd day of January, 1959, came the attorney of the Government, and the defendant appeared in person and by counsel, Edward Carey and Robert Ackerly, Esquire.

It is Adjudged That the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Violation Section 2401, T. 22, D. C. Code and Violation Section 2901, T. 23, D.C. Code as charged:

And the Court having asked the defendant whether he had anything to say why judgment should not be pro-

nounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged That the defendant is guilty as charged and convicted.

The sentence of the Court was as follows; and it is so adjudged:

Willie Lee Stewart, you have been found guilty upon an indictment including the charge for the offense of murder in first degree, and, upon the verdict of guilty, you are hereby sentenced to the punishment of death by electric [fols. 34-228] execution; and it is

Ordered That you, Willie Lee Stewart, be forthwith taken to the District of Columbia Jail, otherwise known as the Washington Asylum and Jail, in the District of Columbia, and there be kept in close confinement; and that on the 24th day of April, A.D., 1959, you be taken to the place prepared for your execution in the District of Columbia Jail, and that then and there you be electrocuted according to law; and it is

Further Ordered That a certified copy of this judgment and commitment be transmitted by the Clerk of the United States District Court for the District of Columbia to the Superintendent of the aforesaid District of Columbia Jail not less than ten days prior to the time fixed in this judgment of the Court for the execution of the same.

/s/ F. Dickinson Letts, Chief Judge.

# IN UNITED STATES DISTRICT COURT

## NOTICE OF APPEAL—Filed February 2, 1959

Name and address of appellant: Willie Lee Stewart, District Jail.

Name and address of appellant's attorney: Robert L. Ackerly, 1625 K Street, N.W., Wash. 6, D.C.; Edward L. Carey, 821 Fifteenth St., N.W., Wash., D.C.

Offense: First Degree Murder.

Concise statement of judgment or order, giving date, and any sentence: Guilty as charged—Sentenced to death on January 16, 1959.

Name of institution where now confined, if not on bail:  
District Jail.

I, the above-named appellant, hereby appeal to the  
United States Court of Appeals for the District of Colum-  
bia Circuit from the above-stated judgment.

February 2, 1959.

—, —, Appellant, /s/ Robert L. Ackerly, At-  
torney for Appellant.

/s/ Edward L. Carey, Attorney for Appellant.

[fol. 229]

### Excerpts from Transcript of Proceedings

#### EXCERPTS FROM TESTIMONY AT PRIOR TRIAL READ INTO RECORD

Mr. Ackerly: Members of the jury, at the earlier trial, several witnesses appeared and testified. They were called by the attorney then representing the defendant and were cross-examined by Mr. Smithson.

Five of these witnesses are not available. One of them we know to be dead; one, we understand, is in a hospital in California where we can't locate him. Some of the others, we just can't find. In an attempt to bring a full picture to the jury, we are going to read into the record the testimony of these witnesses. I will act as the examining person, and Mr. Carey will act as the witness. And Mr. Smithson will have an opportunity to cross-examine.

This is accepted and approved procedure, and it's been approved by his Honor during this testimony before you.

The first witness will be Irene Anderson, whose testimony begins at page 351 of the transcript of the first trial.

(Mr. Ackerly, Mr. Carey and Mr. Smithson then read from the transcript of the first trial, June 24, 1953, as [fol. 230] follows:)

"Question: Please state your full name.

"Answer: Irene Anderson.

"Question: Where do you live?

"Answer: 3733 J Street, Northeast.



"Question: Do you know the defendant, Willie Lee Stewart, in this case?

"Answer: Yes, I do.

"Question: And how long have you known him?

"Answer: Well, from about the age of 12—I mean 6, between 5 and 6.

"Question: Are you related to him?

"Answer: Yes I am.

"Question: What is your relationship?

"Answer: First cousins.

"Question: Where was it that you first knew him?

"Answer: Well, when I first knew his him mother brought him from Columbus, Ohio to live with my grandmother—I mean his grandmother.

"Question: Were you living there at the time?

"Answer: Yes, I was.

"Question: And where was that?

"Answer: That was in Saluda, South Carolina.

"Question: At that time, how old was Willie Stewart?

[fol. 231] "Answer: He was about six, I would say.

"Question: About six years old?

"Answer: Uh huh.

"Question: And he came there to live with his grandmother?

"Answer: Yes, he did.

"Question: Was that on his mother's or father's side?

"Answer: His father.

"Question: His father's side

"Answer: Uh huh.

"Question: You were living there?

"Answer: Yes, I was.

"Question: How long did Willie continue to live there?

"Answer: He lived there until my grandmother passed, and she passed when he was about eleven years old.

"Question: During the time that he was living there in the same house with you and his grandmother, were there any acts of his that were not normal, in your opinion?

"Answer: Yes, there was.

"Question: Will you please tell the Court and jury any conduct of his that wasn't normal?

[fol. 232] "Answer: Yes; well, what I know, I mean when we were going to school he would often go to school and then he wouldn't stay in his class, and one time I can remember he was out and he was taken all his clothes off and we had to look for his clothes and we couldn't find them and then finally some of the other kids found his clothes and gave them to the teacher and so the teacher dressed him and we taken him home.

"Question: Now, can you tell us about how old he was at that time?

"Answer: Well, he was about, I would say about seven.

"Question: And that was when he was at school?

"Answer: Yes, it was.

"Question: Now, what else?

"Answer: Well, he would often take his food and dump it, dump his food out on the floor, or just knock the plate off the table; and at night, I mean everybody would be in bed and then we would hear somebody up running around through the house, and my grandmother would get up and she would find him walking around and running around out front, and so she would ask him what was wrong, and he would say, 'I want my mommy.'

"Question: Would you be present at any time when he would talk to his grandmother?

[fol. 233] "Answer: Yes, I were there.

"Question: You were there?

"Answer: Yes.

"Question: And what would he say?

"Answer: She would ask him, 'Well, Baby, what's wrong;' he would say, 'I wants my Mommy.'

"Question: You say he would take his food and throw his food on the floor?

"Answer: Yes.

"Question: Would that happen or did that happen on more than one occasion?

"Answer: Yes, sir, it happened quite often, I would say about once a month he would get like that for two or three days and then he would be all right.

"Question. Was there anything else about his conduct that was not normal?"

"Answer: Well, since I have been here in Washington—

"Question: Just back there as a child, anything about his clothes?"

"Answer: Oh, yes. Well, he would often take his clothes—my grandmother would go and buy him clothes and buy—I mean my sister and I clothes and he would take his clothes and cut them up, and then I mean sometimes he would just tear his clothes off of him or take the scissors or a knife or anything and cut [fol. 234] his clothes up, and she would ask him why he did it and he wouldn't even give an answer.

"Question: Did that happen frequently or infrequently?"

"Answer: No, as I said, about once a month he would just do things like that.

"Question: Would you be present or were you present at any time when his grandmother would talk to him about having cut up his clothes with scissors and torn them up?"

"Answer: Yes, I were.

"Question: What would happen then?"

"Answer: Well, he wouldn't say anything, he would just say—sometimes he would say, 'Well, I don't know.'

"Question: Did you know the aunts of the defendant, Willie Stewart?"

"Answer: Yes, I did.

"Question: How many aunts did he have?"

"Answer: Well, he has five of them.

"Question: Well, were there two aunts that lived down there?"

"Answer: Yes, there was.

"What were their names?"

"Answer: One was named Beatrice and the other was named Louise.

"Question: And in your opinion,—

[fol. 235] Mr. Smithson: May it please the Court, at this point, I believe that the objection which was made as to the next question should be excluded.

Mr. Ackerly: Whoever asked him asked the Court to rule on it.

Mr. Smithson: I objected to it because it was an improper question the first time, I believe; in fact, counsel withdrew the question.

The Court: If the question has been withdrawn, I think it should be omitted.

Mr. Ackerly: Thank you, your Honor.

"Question: You say you did know these two aunts?

"Answer: Yes, I did.

"Question: And he lived down there where you lived?

"Answer: Yes.

"Question: And how long have you know them?

"Answer: Well, I went to school with them for some time.

"Question: And you saw them frequently?

"Answer: Yes, I did.

"Question: Did there come a time when they passed away?

"Answer: Yes.——"

Mr. Smithson: Before he answers, at this point, your Honor, may I read the record for just a moment before [fol. 236] Mr. Carey answers?

The Court: Yes.

(Mr. Smithson reads the record at counsel table.)

Mr. Ackerly: This is now at page 360.

Mr. Carey: I have it.

"Question: You observed the two aunts of his down there when you were living down there, did you not?

"Was there anything in their conduct that was out of the ordinary?

"Answer: Uh huh."

Mr. Ackerly: There's another answer on down there.

"Answer: Yes, sir.

"Question: In regard to these two aunts of his, was there anything that you observed yourself about their conduct that was abnormal or peculiar?

"Answer: Well, all that I know is that when, I mean, as we were going to school they were very quiet and they would often sit up with their mouths open and whatsoever you call it, spit would just run from their mouths, just like that, and they never had anything to say, you know.

"Question: In your opinion, from what you observed of them, were they of sound or unsound mind?

"Answer: They were unsound mind.

"Question: Did you know his brother?

"Answer: Yes, I did.

[fol. 237] "Question: And did you observe him?

"Answer: Yes.

"Question: What was the name of his brother?

"Answer: The brother was Elzie Stewart.

"Question: How old was he?

"Answer: Elzie was about three when I first knew him.

"Question: And how long were you around the brother?

"Answer: Well, I was around him for about eight or maybe nine years.

"Question: Did you notice anything peculiar about his conduct?

"Answer: Well, he was quiet and nothing to say, I mean at no time, just sat quiet and look and stare, and if you say something to him he would just nod his head, or something like that, and he often kept his mouth open with, you know, just spit running from his mouth.

"Question: In your opinion, from your observation of his brother, was his brother of sound or unsound mind?

"Answer: He was unsound.

"Question: Did there come a time when you came to Washington?

"Answer: Yes, there was.

"Question: Are you married?

"Answer: Yes, I am.

[fol. 238] "Question: Are you living with your husband?

"Answer: Yes.

"Question: After you came to Washington, did you see the defendant, Willie Stewart?

"Answer: Yes, I did.

"Question: When did you see him when he was in Washington?

"Answer: Well, I saw him in 1946 when he first came out of the service, on a furlough I think it was.

"Question: Was there anything in regard to his conduct then that was peculiar?

"Answer: No, there wasn't, not at the present, but after he went back into service and came back there was.

"Question: When did you see him after he came out of the service?

"Answer: After he came back out it was in '48, I believe, '47 or '48 and I saw him then.

"Question: Did you see him at that time? When he did come back out of the service in 1948, did you see him?

"Answer: Yes, I saw him.

"Question: Where did you see him?

"Answer: At my house.

"Question: And was there anything peculiar about his conduct at that time?

"Answer: Well, he was just loud and everything [fol. 239] and talked, I mean, and so I would say—I would say, 'Willie, look's like you is worse now, what's wrong with you?'

"And He said, 'I don't know;' he said, 'I've been over there,' and he said, 'If you got good mind when you come from over there,' he says, 'you's a good one'—overseas.

"Question: Was there anything further about his conduct?

"Answer: No, not until later—and, well,—I saw him two years this month; and I have a baby, too—well, will be three in September—and the last time he were at my house the baby was crying, and so he told the baby, he said, 'If you don't shut up I will put my damn fist in your mouth. And so my husband told him he thought it was best for him to leave, and so he just cursed us all out, and so my husband told him to leave, and he went in the bedroom and he laid down across the bed, and got up.

"Question: You say he cursed you all out?

"Answer: Yes, he did.

"Question: What did he say?



"Answer: Why, he told us he didn't give a damn about nothing; he would kill the last damn one of us.

"Question: Then who did he do?

[fol. 240] "Answer: My husband told him to leave, and so he goes in the bedroom and laid down across the bed and goes to sleep, and then when he gets up later on he asked me to fix him something to eat, and I did, and then he left.

"Question: In your opinion, is the defendant, Willie Stewart, of sound or unsound mind?

"Answer: He's unsound."

Mr. Smithson: Would, your Honor indulge me just a moment, please?

In order that some sort of explanation may be made, I'll go along with this and ask the questions on the cross if Mr. Carey will make the answers.

The Court: All right. If that's agreeable.

Mr. Carey: Perfectly delighted to do it for the prosecution, your Honor.

The Court: Yes.

(At this point, Mr. Smithson read the questions on cross-examination at the previous trial, and Mr. Carey read the answers:)

"Cross-examination.

By Mr. Smithson:

"Question: Now, I believe you say that you met Willie Lee Stewart at the age of six, is that correct?

"Answer: Yes, I did.

"Question: How old are you?

"Answer: Thirty-two.

[fol. 241] "Question: You are thirty-two?

"Answer: Yes, I am.

"Question: Do you know how old Willie is?

"Answer: Willie will be 31 in August.

"Question: So you are about a year older than he is, is that correct?

"Answer: Yes, I am.

"Question: And I believe you said that this first event that you talked about where he took his clothes off, he was seven years old, is that correct?

"Answer: Yes, he was about seven.

"Question: And you were eight then, is that correct?

"Answer: Yes.

"Question: And you remember that?

"Answer: Yes, I remember that very well.

"Question: And you have known other children, have you not, who have thrown their food on the floor and torn their clothes off, and have what are called temper displays?

"Answer: No, I haven't.

"Question: All of your children that you have ever seen are nice and quiet?

"Answer: No, they are not nice and quiet, but I mean a child wouldn't just up and tear his clothes off through a passing madness.

[fol. 242] "Question: You have heard of something called anger and temper, have you not?

"Answer: Yes, I have.

"Question: And you said that the child wouldn't stay in school, that is, Willie Lee Stewart wouldn't stay in school?

"Answer: Yes.

"Question: You have also heard of children skipping school, have you not?

"Answer: Yes, I have.

"Question: And it is on those bases that you feel he is abnormal of unsound mind?

"Answer: Yes.

"Mr. Smithson: I have nothing else."

Mr. Ackerly: The next witness, your Honor, is Julia Daniels.

Mr. Smithson: For the record, your Honor, an attempt was made by both parties to subpoena this witness. She had been, of course, subpoenaed by the government. I would ask, to make sure, that the Marshal check outside

I have not seen her, but I have received some indication that she might be here.

Julia Daniels.

(To the Marshal.)

The Marshal: She's not in the witness room. I'll check [fol. 243] out here.

Is Julia Daniels in Court?

(The Marshal left the courtroom, and returned shortly.)

The Marshal: She doesn't answer outside either.

Mr. Smithson: Then, under the circumstances, the government will stipulate, under Rule 15, that the testimony may go in as before, your Honor.

The Court: Very well, Mr. Ackerly, you may proceed.

(At this point, Mr. Ackerly read the questions, and Mr. Carey read the answers in the testimony of Julia Daniels on direct examination at the previous trial:)

"Question: Will you please state your full name?

"Answer: Julia Mary Daniels.

"Question: Where do you live?

"Answer: 415 A Street, Northeast.

"Question: Now, do you know the defendant in this case, Willie Lee Stewart?

Mr. Carey: You skipped a question, Mr. Ackerly.

Mr. Ackerly: Yes. Well—

Mr. Carey: Oh—I'm sorry.

Mr. Ackerly: Have you got it?

Mr. Carey: Yes.

Mr. Ackerly: The pending question is:

[fol. 244] "Question: Do you know the defendant in this case, Willie Stewart?

"Answer: Yes.

"Question: How long have you known him?

"Answer: About from 1946.

"Question. Does he live in the same house that you live in?

"Answer: Yes, he does.

"Question: How long has he lived in the same house?

"Answer: Three years.

"Question: Have you noticed anything peculiar in his behavior?

"Answer: Yes, I has.

"Question: Will you please state to the Court and jury what you have noticed about his behavior that has been out of the ordinary?

"Answer: Well, I have been knowing him coming in in the afternoon and getting up in the mornings, his reactions to his family and also to the house, from the ways he acts, he acts as unsound, in my way of speaking.

"Question: Just a moment. We want you to tell us not your opinion but what he has done, the thing that he has done.

"Answer: Well, in coming in in the afternoons in using his key he would use his fist to open the door, [fol. 245] take and just smash the door; and two evenings he came in he would take his—he came in and took his fist and just rammed the glass, and the next day his wife would tell him about it and he wouldn't know anything about it.

"Question: You mean you would speak to him about it the next day or later?

"Answer: Yes, I would.

"Question: Would he break in there on occasions when your husband would be there?

"Answer: Yes, he would.

"Question: Let me ask you this direct question: Did he ever break in your room and come in your room when your husband was there and you were undressed?

"Answer: Yes, he did.

"Question: What did he do on those occasions?

"Answer: When my husband was there?

"Question: Yes.

"Answer: Well, he would just make a funny move and go on out; he wouldn't say anything; he would just make a funny move and go out, walk out of the room.

"Question: Are there any other things which he has done that you were present and know about?

"Answer: During the time I was present he would come downstairs when I was cooking in the kitchen,

and on one occasion he smashed the icebox, knocked the door loose and just ramshacked the door, the door [fol. 246] couldn't be fixed. And he come in one afternoon—he went out to the circus and won some dishes, and he came in and he went upstairs and I heard the noise of crushing of glasses, and things, and so I walked up and he was just stomping and taking the dishes and just crushing them up into the floor. And he had a new hat and which he had just went down and bought, and he cut it all up and threw it out—a brown velvet hat.”

Mr. Ackerly: This is an interrogation by the Court:

“Question: Were they your dishes?

“Answer: No, they wern't; they were his dishes.”

Mr. Ackerly: Back to counsel again:

“Question: You say they were new dishes which he just brought home?

“Answer: That's right; new dishes.

“Question: Is there anything further you want to add.

“Answer: Yes, and I asked—

“Mr. Smithson: Objection to that, your Honor.”

Mr. Ackerly: The Court's ruling: “You see, the way you put it, it is dangerous.” And it was rephrased, as follows:

[fol. 247] “Question: Is there anything further in regard to his conduct and his peculiarities?

“Answer: Yes. I noticed him when he come in he would grit his teeth and he act real nervous and he would lay down, and he would go in and lay down, and he would say he thinks his heart was going to stop beating; and he would just ‘go away’ and he wouldn't know anything about what had happened, and his wife would speak to him next day concerning it and he would deny it; he wouldn't know anything as to what had happened.

“Question: What was his attitude toward his wife and children?

“Answer: Well, he acted as if they wasn't anything to him.

"And certain occasions he would come in and he would just start beating and scolding the children.

"He locked them out and in the wintertime during the month of January, and it was cold, and they couldn't get in.

"And at night he would come in—and it wouldn't have to be at night when he would come in, he would get up in the morning around about 10 or 11 o'clock and he would start scolding at the children and telling them to get out, he didn't want them in the room, and just telling them he didn't want to be bothered, he [fol. 248] wasn't going to feed the children, that they wasn't his children, he didn't have any children.

"Question: In your opinion, is the defendant, Willie Stewart of sound or unsound mind?

"Answer: Unsound mind, in my opinion—to him, the way he has been acting at my residence since '50, from 1950."

Mr. Ackerly: These are questions by the Court:

"Question: He first came to live in your home in 1950?

"Answer: That's right, in March.

"Question: And lived there ever since?

"Answer: Ever since."

Mr. Ackerly: Back to counsel again, your Honor.

"Question: Did you ever call the police by reason of his conduct?

"Answer: I really did.

"Question: On how many occasions?

"Answer: Three or four occasions.

"Question: Have you asked him to move?

"Answer: That's right, I asked him to move and the police would tell him to go on and go to bed, and during the time of the Hallow'een night he came in and he started—he shot at my wife and then he came down—I ran; frankly speaking, I ran out of the room [fol. 249] because I was afraid he was going to shoot me, and so I ran next door to my neighbors. And the police came and they carried him down; but then within two hours he was out and the police came into



the house during the time they had him locked up and told his wife that—

“Question: Were you present?

“Answer: Yes, I was.

“Question: Was he?

“Answer: No; they had him in the precinct.

“Question: Were you present at the time that he shot at his wife?

“Answer: Yes, I was.

“Question: Will you tell us what occurred on that occasion?

“Answer: On that occasion he shot at his wife on Hallow’een night of last year and he—

“Question: Just a moment. What preceded that? What happened before he shot his wife—shot at her?

“Answer: Well, he just started arguing, just an argument, and he started and he said he was going to shoot her, and also he said he was going to shoot the baby, while she was holding the baby, her little young baby; and he shot once and he went to shoot again and he told her, ‘Don’t move,’ and she refused to move and he didn’t shoot again. So I wouldn’t get at, you [fol. 250] know, where he could see me because I feared he would start with me, so I ran out and he came downstairs and he met my brothers at the door, and they told—and he told my brother that if they wanted to take it up—

“Question: Were you present?

“Answer: No, I wasn’t present when he came downstairs; I had ran.

“Question: You can’t tell us that.

“At the time he shot at his wife, did she have the child in her arms?

“Answer: Yes, she did.

“Question: Had his wife done anything to him—how long had you been in the room with his wife before the shooting occurred?

“Answer: Approximately it was two hours.

“Question: You had been there?

“Answer: That’s right.

“Question: How long had he been there?

“Answer: Well, he had only been there about an hour, I would say about an hour.

"Question: Had his wife done anything to him?"

"Answer: Not at all. We was sitting down talking and he came in, you know, and started an argument just 'I don't like you and you're no good,' and so on, and begun from that; and he said he was going to shoot [fol. 251] her, and after I heard him say he was going to shoot I decided I would leave out from the room from the public where he couldn't see me and listen as to what he was saying, and I heard him and then I heard him when he shot, and she said, 'Oh,' and then he said, 'Don't move, I'll shoot again.'"

"And then I ran down the steps and that's when he came down the steps and met my brothers. I ran next door."

"And also I would like to state about I asked him to move——"

Mr. Ackerly: Don't state that. Questions by the Court now:

"Question: Who did you ask?"

"Answer: I asked him to move, and he refused to move."

"Question: And when did you ask him to move?"

"Answer: Well, I asked him to move before Halloween."

"Question: Of what year?"

"Answer: It was 1952."

Mr. Ackerly: Back to counsel now, your Honor:

"Question: Did you at any time refuse to take rent from him?"

"Answer: Yes, I did, for two months I refused to take rent from him."

[fol. 252] "Question: On those occasions when you requested him to move and refused to take rent, what was his attitude toward you?"

"Answer: Well, he would want to know as to why I wanted him to move. He seemed to not understand why I wanted him to move."

"And on one occasion I asked him to move the police was there, during a fight one night, from No. 9 Precinct, and I asked him to move, and the police told me to go down and take out a warrant for him."

"So the next day he didn't know anything concerning it, so on the mercy of his wife—I liked her, and also she was my sister-in-law—and I didn't you know, make any further prosecution toward having him to move.

"That is all."

(At this point, Mr. Smithson read the questions in the cross-examination at the previous trial, and Mr. Carey read the answers:)

"Question: You know the charge that is facing him? Do you know what he is accused of?"

"Answer: Yes.

"Question: You know he is accused of, on March 12, 1953 of shooting Harry Honikman in a robbery; you know that, don't you?"

"Answer: Yes.

[fol. 253] "Question: And I believe you said that when you had one fight with him, that he didn't understand why you wanted him to leave, is that right?"

"Answer: That's right.

"Question: But on the 13th of March, Friday evening, when you and he talked about this crime, he knew what happened, didn't he?"

"Answer: No. He hasn't talked to me anything about concerning the crime.

"Question: Let me ask you this: On Friday evening, March 13, 1953, weren't you and Willie Lee Stewart in the upstairs hallway of your home, 415 A Street, and didn't you have a conversation there?"

"Answer: No, I did not.

"Question: And didn't Willie say to you at that time—and that's Willie Lee Stewart—'You're trying to start something by telling Annie that I did what's in the paper'; and didn't you then tell him that Annie had the paper and that she had showed it to you?"

"Answer: Yes, I told him that.

"Question: And at that time, didn't he grab you by the shoulder and say, 'You're trying to start something,' and didn't you tell him at that time that if he didn't leave you alone you would turn him in?"

"Answer: Yes, but I couldn't come to a conclusion [fol. 254] that he did it.

"Question: You didn't conclude he had done it?

"Answer: No, I didn't; I couldn't prove evidence that he had shot the man.

"Question: And on each of these occasions, you talked here of the use of the key; as I understand it he used his key and then hit the door with his fist in order to open it?

"Answer: That's right.

"Question: Rather than push on it he would hit on it?

"Answer: That's right.

"Question: In other words, just a tough guy?

"Answer: That's right, and didn't know the next day what had happened to his fist.

"Question: Wouldn't know what had happened?

"Answer: That's right.

"Question: And that time that he had an argument with you about the refrigerator, that was his refrigerator, wasn't it?

"Answer: Yes, it was.

"Question: And you had food in it, isn't that correct?

"Answer: That's right.

"Question: And he was arguing with you about you keeping any food in the refrigerator?

[fol. 255] "Answer: That's right.

"Question: That's when he pulled the door open and got angry, is that right?

"Answer: Not on that day he didn't.

"Question: And on occasion you say he would beat and scold his children?

"Answer: That's right.

"Question: And he would get up around 10 or 11 o'clock in the morning and fight with them?

"Answer: That's right.

"Question: What was he doing getting up at 10 or 11 o'clock in the morning? Doesn't he work?

"Answer: Yes, but certain days he didn't have to work.

"Question: Certain days he didn't have to work?

"Answer: That's right.

"Question: Certain days he didn't have to work or certain days he didn't choose to work?"

"Answer: Certain days he didn't have to work."

"Question: You are sure of that?"

"Answer: I am sure—on the work he was doing, window cleaning."

"Question: He paid you rent, didn't he?"

"Answer: Yes, he did."

"Question: On this occasion that he had an argument [fol. 256] with his wife and then shot at her, what hour of the day or night was that?"

"Answer: It was around about 11 o'clock at night."

"Question: And you had been in their room for two hours, from about 9 o'clock?"

"Answer: That's right."

"Question: How big is that room?"

"Answer: Well—I couldn't set a definite—"

"Question: How long is it? Can you point out to some spot in this room which would represent—from where you are sitting, the length of the room?"

"Answer: It wouldn't be the width."

"Question: Well, the length and the width, I want both."

"Answer: From the door there across to the other one?"

"From that door to that door?"

"Answer: That's right."

"Question: Starting from the back and coming—" pardon me. "From that door to that door?"

"Answer: Starting from the back and coming to that door; I wouldn't say from this view because it is larger—from that door to that door."

Mr. Smithson: This is by the Court:

"Question: You mean those gates there to the main [fol. 257] door?"

"Answer: Yes, that's right, starting from the gates."

Mr. Smithson: Again, for the government, your Honor:

"Question: It is the distance from that gate right here to the wall there, is that right?"

"Answer: That's right."

"Question: And how wide was it?"

"Answer: Well, the width of it—in fact it was the smallest room in the house.

"Question: It was the smallest room in the house?

"Answer: That's right.

"Question: But you don't know how wide it was?

"Answer: No, I don't.

"Question: It is your house, isn't it?

"Answer: What's that?

"Question: It is your house, isn't it?

"Answer: Yes, it is.

"Question: At the time you were in this room with Annie Lee Stewart on this night when he is supposed to have shot at her, were there any other people in that room with you?

"Answer: Yes, they were playing cards. There was Jeep, Annie, Robbie, myself and Willie.

[fol. 258] "Question: Some children were in there too, weren't they?

"Answer: No—yes, there was children of Robbie, the girl that was rooming in there, her children.

"Question: I don't think you follow the night I mean—the night that Willie Lee Stewart shot at his wife, Annie Lee, who was in the room there with you and Annie Lee?

"Answer: Oh, his baby.

"Question: Just one baby?

"Answer: That's right, just a little baby girl.

"Question: And they have four children, don't they?

"Answer: That's right.

"Question: What were you doing in there for two hours?

"Answer: Well, we was sitting down talking and discussing different things.

"Question: Isn't it a fact that Annie Lee Stewart was asleep there that night when he came in and started the argument and you were not in the room?

"Answer: No, she was awake. We were in the room talking when he came in.

"Question: On each of these occasions, the argument with you, the argument and hitting of the children, and the argument and shooting of his wife, he refused to [fol. 259] move when you asked him, each time it would be his wife or you or the children, is that right?

"Answer: That's right.



"Question: In other words, about what you have said is that this is probably the biggest bully in the city of Washington, isn't that true?

"Answer: No, he seemed to go out of—he acted as a person of unsound mind.

"I think a person that do things like that would be unsound. To Your Honor, Judge, doesn't you think the same thing—a person would be unsound?"

Mr. Smithson: I think the Court's answer should be given at this point, your Honor:

"That is not for me to say. That is all."

That is what the Court said, and I said, "That is all."

(At this point, Mr. Ackerly read the questions on redirect examination in the testimony at the previous trial, and Mr. Carey read the answers:)

"Question: You stated on cross-examination that he became angry because you had put some food in his ice-box?

"Answer: Yes.

"Question: That is the defendant's icebox, Willie Stewart's icebox?

"Answer: Yes.

[fol. 260] "Question: And what did he do when he found you had food in his icebox?

"Answer: He threw my food on the floor.

"Question: What else did he do?

"Answer: And left it laying there; he didn't move it.

"Question: Did he do anything to the icebox?

"Answer: Yes; he ramshacked it, he ramshacked the icebox; he just tore the door out with his fist and took his fist and just burst the door and then took his hand and just kept pulling the door until he got the door completely out of there; you couldn't close the door, and then he kicked the motor out; it wasn't any good after that.

"Question: You testified that you had a conversation with Willie Stewart on the night of March, Friday night, I believe that was the 13th, in the hallway of the house.

"Answer: No, it wasn't. It was in the afternoon. It was in the afternoon I had a talk with him; it was just about one or two words passed on Friday evening—it wasn't Friday night, it was Friday afternoon.

"Question: And what was that that was said?

"Answer: He said that I was, you know, trying to start up something about the paper and which his wife had showed him, you know, concerning this and any—[fol. 261] thing that would happen to them he would take the spit out on me, I mean he would just jump to the conclusion that I was upholding her in the thing.

"Question: Did he deny that he had committed the crime?

"Answer: Yes, he did; he denied it; he didn't know anything about it; he didn't even know anything had happened. When she was showing him the paper he denied it.

"Question: In your opinion, from your observation of the defendant, Willie Stewart, is he of sound or unsound mind?"

Mr. Ackerly: At this point, your Honor, the Court interrupted to say:

"You have asked her that twice and she has answered it."

Recross-examination.

By Mr. Smithson.

(At this point, Mr. Smithson read the questions in the testimony at the previous trial, and Mr. Carey read the answers on recross-examination.)

"Question: This conversation that you had with his wife the night of the shooting, when he tried to shoot his wife, what was that conversation about?

"Answer: Well, I was talking to her concerning different things about the house.

"Question: For two hours?

[fol. 262] "Answer: Well, I wouldn't be just on that conversation for two hours but we was just talking, sitting in the room talking when he walked in.

"Question: And he walked in around 11 o'clock, is that right?

"Answer: That's right, probably; I couldn't say exactly that it was 11 o'clock.

"Question: When did he leave there that day?

"Answer: Well, on that day he had been working; he came in from work.

"Question: About what hour did he come in from work?

"Answer: Well, it was around three or four o'clock in the afternoon.

"Question: How long did he stay there?

"Answer: Well, about an hour and a half I would say—I couldn't say—I wouldn't say an hour and a half; I just said between the time he did go out and then when he came back in.

"Question: Will you tell me how you can remember that he came back in at three or four o'clock in the afternoon, stayed about an hour or an hour and a half?

"Answer: That's what I said, I can't remember the exact time.

"Question: But you can remember very well that it happened on the same day that he shot at his wife? [fol. 263] "Answer: Yes.

"Question: You can remember that very clearly?

"Answer: Yes, I can.

"Question: And this argument about this refrigerator, he didn't like your using it and putting food in it, is that right?

"Answer: He had told me I could use the Frigidaire; he had made it plain to me that I could use it, but in his way of acting that's what I couldn't understand his doing that.

"Question: And when he went out and opened it up and found your food in it he got angry?

"Answer: Well, not only my food was in the box but the girl upstairs, Robbie Coleman had her food in the box.

"Question: In other words, other people were using his property, is that right?

"Answer: That's right.

"That is all."

The Court: That is all of it?

Mr. Carey: I'm sorry, your Honor?

Mr. Ackerly: That's all of that witness, your Honor.

Mr. Carey: How many more are there, Mr. Ackerly?

Mr. Ackerly: Three, but they are all short.

The Court: That will be all for today, gentlemen.

[fols. 264-266] I will ask the jury to keep in mind the admonition, and be back promptly at nine forty-five in the morning.

Mr. Ackerly: Your Honor, I wonder if we might—this is a little bit unusual—overnight borrow this transcript to work with?

The Court: I don't quite understand?

Mr. Smithson: I believe what counsel wants to borrow is the clerk's copy of the transcript.

Mr. Ackerly: The clerk's copy, your Honor.

The Court: I don't understand—

Mr. Ackerly: It's the clerk's copy, your Honor; we don't have a copy.

The Court: Copy of what?

Mr. Ackerly: The transcript of the two prior trials.

The Court: Oh, yes, certainly, Mr. Ackerly.

Mr. Ackerly: Thank you.

(Accordingly, at 3:50 p.m., the Court recessed until 10:00 o'clock a.m., November 19, 1958.)

[fol. 267]

# PROCEEDINGS

The Court: Will counsel come to the bench.

(At the bench:)

The Court: I understood from your statement we are proceeding on this two-count indictment?

Mr. Smithson: That is correct, your Honor. That is right, your Honor.

The Court: The other, in four counts, we are not concerned with that.

Mr. Smithson: What we did, your Honor, in this matter, the second trial—You see, the first trial we tried the other two. Annie Lee Stewart was convicted of accessory after the fact. Willis Daniels was exonerated. When we tried it the second time, with the permission of Mr. Wood, we prepared an indictment in form listing two counts and only the defendant, Willie Lee Stewart.

The Court: That is your understanding?

Mr. Carey: That is right. No objection.

The Court: The thing confused me. They bear the same number.

Mr. Smithson: Yes.

The Court: But I understand it now.

(Counsel returned to trial tables.)

The Clerk: Are there any witnesses in the courtroom [fol. 268] who have not yet testified, please retire to the witness room at this time.

The Court: Mr. Ackerly, you may proceed.

Mr. Ackerly: Thank you, your Honor. We have three more witnesses whose testimony appeared at the earlier trial who are not available. We would like to put those in evidence now.

The Court: You may do so.

Mr. Smithson: The same stipulation, your Honor.

Mr. Ackerly: As to the unavailability of witnesses.

The first witness will be Yancy Peterson, appears on page 396 of the transcript.

(Mr. Ackerly then read the questions and Mr. Carey read the answers of the following.)

(Reading.)

"Question: What is your full name?

"Answer: Yancy V. Peterson.

"Question: Where do you live?

"Answer: 615 M Street, Northeast.

"Question: Do you know the defendant, Willie Lee Stewart?

"Answer: Yes, sir; I know him.

"Question: And how long have you known him?

[fol. 269] "Answer: I met him in the year 1943 when we went in the service. We was in the service together, enlisted in the service—drafted in the service, January 19, 1943.

"Question: Were you in the same company he was in?

"Answer: That is right; same company.

"Question: How long were you in the same company he was?

"Answer: We was in the same company until we was discharged in 1945.

"Question: You were two years in that company?"

"Answer: Two years and eleven months.

"Question: Did that company—where was it located?"

"Answer: We was here in the States in Florida, and we spent 30 months in the South Pacific together.

"Question: During that period of time did you notice anything about his conduct that was not normal?"

"Answer: Well, I thought he wasn't normal because of things he did in the service.

"Question: Will you please state to the Court and jury the things he did that were not normal?"

"Answer: Well, during the year 1944 we was in [fol. 270] the South Pacific in the CBI theatre. I know that Willie, he was driving a truck—Willie, he was a truck driver during the time. He ran over a cliff. And things that he did, he seemed like he didn't have no knowledge he was doing wrong.

"I know he used to be walking guard, and he was in a very dangerous area, and during the time he was walking guard, he get tired, he just quit. The company commander, many times he punished him, but, he said it wasn't any use to keep punishing him, because he didn't know any better, so they didn't convict him of anything.

"During the time he was—he used to walk guard. When he was walking guard, many times he just, when he get tired being on guard duty he just quit and come on back and go to sleep. Then the company commander said, 'Well, I have punished him a few time,' but then he say, 'It ain't no use to keep punishing him because he don't know any better.'

"Question: Anything else in his conduct, about his conduct?"

"Answer: I mean a few times he went over the hill. When he get tired of being at the camp he just want to go AWOL. He go off. They never convicted him, never punished him for it.

[fol. 271] "Question: What do you mean by AWOL?"

"Answer: For instance, on Burma Road, he get tired of that, he wanted to go over in the city, he would just go over in India, quit work, go over in India. They didn't convict him. If they convicted him, he didn't



know whether he was wrong. It wouldn't do any good, like it didn't take effect on him no way.

"Question: Did you say he ran a truck over a cliff?

"Answer: That is right.

"Question: In your opinion, is the defendant Willie Stewart of sound or unsound mind?

"Answer: Well, the experience I had, he is of unsound mind."

Mr. Ackerly. (Reading) "You may cross-examine."

(Mr. Smithson and Mr. Carey then read the cross-examination as follows.)

"Question: This time when he ran the truck over the cliff, were you with him?

"Answer: I was working there. We was loading the truck on the hill. We was actually working on the hill, 8,000 feet above sea level, so he was the truck driver, and we was loading. I was one of the fellows that loaded the truck. He just pulled up, put it in gear, [fol. 272] ran right over the cliff.

"Question: Just put it in gear and went over the cliff?

"Answer: That is right.

"Question: Do you know when he drove the truck over whether or not it was a mistake, he didn't stop in time, or what?

"Answer: It wasn't no mistake, He just went over the cliff.

"Question: How far did he fall?

"Answer: He was in the truck. It was something like you fall and then there is a small ravine, you know, a gutter down as you fall down, down the cliff as you go down. He fell 20 feet, I guess.

"Question: Twenty feet. You say when he walked guard he just quit, is that right?

"Answer: Just quit.

"Question: And the times when he went AWOL, you say they didn't punish him?

"Answer: They didn't punish him.

"Question: How do you know they didn't?

"Answer: I was there. I would always be around the office. I mean I was in the supply department and I know what happened there.

[fol. 273] "Question: I thought you said you were loading trucks, a truck driver.

"Answer: I was loading, but I mean I got hurt.

"Question: You got hurt?

"Answer: During the time we was together for two years and eleven months.

"Question: Did the officers discuss with you the fact it wouldn't do any good to punish him?

"Answer: In my presence they have.

"Question: They discussed it with you?

"Answer: Not with me. They have discussed it in my presence.

"Question: Where, in the supply room?

"Answer: I have been in the orderly room. I was supply room clerk, for a limited time. After I got hurt I was put in the supply room. During the time I used to be sitting in the office a lot. I knew what was going on in the company all the time."

Mr. Smithson: (Reading) "Nothing further."

Mr. Ackerly: Here are some questions by the Court, your Honor, which I will read with your permission.

(Reading)

"Question: Let me ask you this: Were you and he discharged at the same time?

[fol. 274] "Answer: Yes, sir.

"Question: When was that?

"Answer: That was November 16, 1945, and he reenlisted again. I reenlisted, but I changed it. I got out.

"Question: He reenlisted?

"Answer: Yes, sir.

"Question: Did he actually go back in the Army?

"Answer: He went back for a year, approximately a year.

"Question: And do you know when he was finally discharged?

"Answer: A year after, I know. I can't recall the date, but a year after.

"Question: How long have you known him here in Washington?

"Answer: Well, I saw him off and on, but I left here and I went to New York and I stayed there for about six year.

"Question: When did you come back?

"Answer: I came back about three months ago.

"Question: Did you see him during that three months?

"Answer: I didn't see him.

[fol. 275] "Question: What kind of a discharge, if you know, did he get?

"Answer: I knew the first discharge—I mean I think it was—I didn't read it.

"Question: All right, then. You can't answer."

Mr. Ackerly: Counsel added: "I might say this. I have the discharge here.

Mr. Smithson: We will stipulate as to the first one if counsel wants to take the stipulation.

Mr. Ackerly: I think we can stipulate as to both of them.

Mr. Smithson: I think we will at the appropriate time on the second one, if it please the Court.

I will stipulate on the first discharge. It was an honorable discharge.

The second one, when we get to that part, I will stipulate to the part of the record we agreed about.

Mr. Ackerly: Which would include a dishonorable discharge.

Mr. Smithson: I don't believe it was a dishonorable discharge. Whatever the language is in the previous stipulation we will agree to it.

The Court: Very well. Read the stipulation.

Mr. Ackerly: Can we read it later, your Honor, so we [fol. 276] can continue with these witnesses and then read the stipulation at a later time?

Mr. Smithson: That is agreeable with the Government.

The Court: Very well.

Mr. Ackerly: I now call Geneva Mason to the stand. Page 402 of the transcript of the proceedings at the first trial.

(At this point, Mr. Ackerly read the questions and Mr. Carey read the answers in the testimony of Geneva Mason on direct examination as follows:)

"Q. Will you state your full name? Your name?

"A. Geneva Mason.

"Q. Where do you live?

"A. Philadelphia.

"Q. Whereabouts?

"A. 1843 North 27th Street.

"Q. Are you related to the defendant in this case, Willie Lee Stewart?

"A. That is right.

"Q. What is your relationship?

"A. Sister.

"Q. How old are you?

"A. Twenty-nine.

"Q. How old is Willie?

[fol. 277] "A. Thirty.

"Q. Were you raised with him as a child?

"A. That is right.

"Q. And where were you and he raised together?

"A. Beg pardon?

"Q. Where were you and he raised together?

"A. Down South.

"Q. Where?

"A. Saluda, South Carolina.

"Q. And by whom? I mean were you and he with your mother and father?

"A. Well, when we were small kids, we was brought to our father's mother.

"Q. How long were you with your father and mother?

"A. I don't exactly know but we was with her until she died.

"Q. And then you say you were with your father's mother?

"A. That is right.

"Q. And about how old were you at that time?

"A. Three.

"Q. How old was Willie?

"A. Six.

[fol. 278] "Q. And how long did you live there with your grandmother?

"A. About two years.

"Q. And then where did you live?

"A. After she died we lived with my mother's mother.

"Q. Where was that?

"A. Same place, Saluda, South Carolina.

"Q. Same town. All right. How long did you live there?

"A. She raised us from then on.

"Q. Did there come a time when Willie left there? Did there come a time when Willie Stewart left?

"A. He left during the time—she raises us up and we started to go to school. He run off two or three times.

"Q. Did there come a time, though, when he left there and went away the last time?

"A. Yes.

"Q. About how old was he then?

"A. He was about 17, or maybe 18.

"Q. So that you lived with him from the time that you started out as a little girl up until the time he was about 17 or 18-years of age?

[fol. 279] "A. That is right.

"Q. During that period of time was there anything about his conduct that was out of the ordinary?

"A. Well, he always fight at me, me and my other brother, and when we was going to school he would fight the teacher, tear off his clothes off of him, tear off her clothes.

"Q. Wait a minute. Don't go so fast. You say he would fight with his teacher. When did that happen?

"A. That was when he was going to school.

"Q. Yes; how old was he?

"A. He was going into 12 or 13, then, going to school all along.

"Q. What did he do, he and the teacher?

"A. The teacher was asking him a question. He would never answer them. He would get mad, go to fighting, throw his books, throw the kids' books all over the room.

"Q. Did that occur on more than one occasion?

"A. He would do it all the time. They expelled him from school for a while.

"Q. Were you attending that school?

"A. That is right.

"Q. Were you in the room when it occurred?

[fol. 280] "A. That is right.



"Q. You say it occurred on how many different occasions that you were present in the room? That is, how many different times did he have difficulty with his teachers?

"A. Wouldn't hardly be a day passed that there wouldn't be something that he would do.

"Q. How far did he go in school? How far did he get in school?

"A. He never learned anything.

"Q. Do you know how long he attended school?

"A. He attended school up until the time he left home.

"Q. Now, then, what else did he do that was out of the ordinary?

"A. Well, in the afternoon he would come on home from school and he would go to work, and he would get to fighting with the man he would be working with, and the man would bring him home, and my grandmother make him go back. And he wouldn't go, and he offered to fight her all the time.

"Q. Any other conduct of his that was peculiar?

"A. He would fight all the time, tear all his clothes off of him and tear mine off of me, and scratch me [fol. 281] all up and pull my hair, throw water all over me, get a bucket of water and throw that on me.

"Q. Was there anything extraordinary about his eating habits?

"A. He would get to the table and he would take the plates, throw them on the floor, take our plates and food, throw them on the floor and break them up.

"Q. No, I believe he lived with his grandmother on his mother's side first?

"A. Father.

"Q. Father's side, and then he went to live with his grandmother on his—

"A. Mother's side.

"Q. What was his conduct when he was living with the first grandmother?

• "A. Well, he acted the same way. That is, during that time he didn't go to school. He wouldn't go. She would send him out to go to school, but he would stay out in the woods all day until time to come home from



school, and the school kids coming home from school, he would throw rocks and things at them.

"Q. At you?

"A. The kids.

"Q. He would throw rocks at them?

[fol. 282] "A. That is right.

"Q. Was there any reason for him to throw those rocks at the children?

"A. I don't know. He just do it.

"Q. He was six years old when he went to live with your grandmother?

"A. That is right.

"Q. He was there until he was around eight, then he went to live with his other grandmother?

"A. That is right.

"Q. What was his conduct when he was living with the other grandmother?

"A. Well, she would send him to school. He would do the same way. He would skip school, and he would lay out till the recess time. Then he would come in the school ground and play with the kids and fight them, and then he would leave and stay back until the kids come out of school.

"Q. Did there come a time when you saw him again after you had left there? Did you leave there and move to Philadelphia?

"A. Yes; I saw him again.

"Q. When did you see him after you had left there and moved up to Philadelphia?

[fol. 283] Q. Well, I came to Washington. I stayed here for quite a little while.

"Q. How long were you here in Washington?

"A. About a year or something.

"Q. Was he here at that time?

"A. That is right.

"Q. Did you notice anything peculiar about his conduct when he was here?

"A. Yes; he would beat his wife all the time, and I would try to stop him. He would draw knives and things on her, ice picks.

"Q. On these occasions you say he would fight his wife, what would be the conduct of his wife toward him?

"A. She wouldn't be doing anything but sitting

there. He just come in, or he had been sitting there, and he just started.

"Q. Is there anything else he has ever done comes to your mind?

"A. He jumped on me a couple of times while I was there, and I left and moved, and I would go backward and forward to see them, and he would still act the same, funny, so I just stopped going around so regular.

"Q. Did there come a time that you moved to Philadelphia?

"A. He came to Philadelphia in 1951 and he stayed up there with me all during the summer, working, and he wanted to fight with me and my husband, and broke up my beds and dishes and things.

"Q. In other words, he came to Philadelphia and stayed at your house during the summer?

"A. That is right.

"Q. Did you charge him to stay there with you?

"A. That is right.

"Q. And he was your guest?

"A. He didn't want to pay anything. He paid me when he felt like it. Whatever I charged him, he didn't pay me that, anyway.

"Q. You say he broke up—what did he break?

"A. I had a new bedroom suite. He broke that down, and he broke a set of dishes was given me. And my Frigidaire door, he tore that off.

"Q. Why did he tear the door off the Frigidaire?

"A. He just got mad and just do it all of a sudden, just do that.

"Q. I mean what had happened before he tore the door off the Frigidaire?

"A. He come in from work, and I asked him if he [fol. 285] is ready to eat. He said, 'No, I don't want nothing to eat. I don't want none of your old food.' And he just starts grabbing things, throwing them.

"Q. What caused him to break up the dishes?

"A. I don't know.

"Q. How many dishes did he break up?

"A. Practically all I had. I didn't have that many.

"Q. At the time that he busted the door off the Frigidaire, did you speak to him about that later?

"A. Yes. He said he didn't know anything about it. He said he didn't do it.

"Q. Pardon me?

"A. He said he didn't do it.

"Q. On the occasion when he broke your dishes, did you speak to him about that?

"A. I did, sir.

"Q. What did he say?

"A. He said he didn't know nothing about them old dishes.

"Q. What?

"A. He said he didn't know anything about them old dishes.

"Q. What about the time he broke your furniture?

[fol. 286] "A. He didn't know nothing about any of that.

"Q. He said he didn't know anything about it?

"A. Nothing about it. While he was there he set his bed on fire.

"Q. What?

"A. The bed on fire, like to got burned up.

"Q. You say he set the bed on fire?

"A. That is right.

"Q. How did he do that?

"A. I don't know. I don't know whether he was smoking or what, but he set the bed on fire and I happened to come in. The house was full of smoke. I was sitting out front. The smoke come bulging down the steps. I went up. He was laying there in the bed dead to the world, from the smoke, I guess.

"Q. Did you speak to him about the fire he set?

"A. Well, he went to the doctor for that, and the doctor treated him for that smoke on his lungs, and he said he didn't know nothing about no fire.

"Q. He said what?

"A. He said he didn't know how he started no fire, he didn't know about no fire being there. He said he didn't burn the bed, I must have done it.

"Q. Now, in your opinion, is the defendant Willie [fol. 287] Stewart of sound or unsound mind?

"A. Why, he is not right. Since we were all coming up my grandmother used to take him to the doctor and the doctor say he was of unsound mind."

Mr. Smithson: Indulge me a moment, your Honor.

Mr. Carey: 413.

Mr. Smithson: I believe the following colloquy should be given to the jury at this time, your Honor. It follows an objection which was made by me and an instruction to the jury at that time. May I have that read also?

The Court: Mr. Ackerly, will you look at it, please.

Mr. Ackley: I will read it, your Honor.

Mr. Smithson: Either way. Either one of us can read it.

The Court: Very well. You may read it.

Mr. Ackerly: (Reading)

"Mr. Smithson: I object to all that.

"The Witness: Well, she was afraid for us to go and play—

"The Court: Yes.

"Mr. Smithson: That was not responsive. How could this witness—

"The Court: Wait a minute. When that gentleman stands up or I start to talk, you stop, will you?

[fol. 288] "The Witness: I am sorry.

"The Court: Ladies and gentlemen of the jury, this is perhaps a perfect example of why hearsay evidence is rejected in the court. There are certain exceptions and there are, of course, reasons.

"Here is this girl telling us what she says a doctor said. We don't know exactly what the doctor said. We don't know whether she even heard it, for that matter, but whether she did or not, we don't know what kind of a basis he had for his statement. Certainly the way she puts it, it is a conclusion from what ever it was a doctor said. It is absolutely and wholly unreliable and dangerously unreliable, as a matter of fact, so you just reject from your minds that piece of her testimony."

That is referring to the last answer.

"All right."

(Mr. Ackerly and Mr. Carey then continued reading as follows:)

"Q. Just answer the question which I asked. Don't state other things. In your opinion, from your observation of the defendant, is he of sound or unsound mind?

"A. We all went to the clinic—  
[fol. 289] "Q. Can't you answer that yes or no? Do you have an opinion about whether he is of sound or unsound mind?

"A. Yes; I do.

"Q. What is it?

"A. He is of unsound mind.

"Q. You had a brother?

"A. Yes.

"Q. What is his name?

"A. Elisha Stewart.

"Q. Is he living today?

"A. He got drowned.

"You may cross-examine."

(The cross-examination was read by Mr. Smithson and Mr. Carey as follows:)

"Q. You have said you were 27, is that correct?

"A. Twenty-nine.

"Q. You are one year and some months younger than the defendant Willie Lee Stewart, is that right?

"A. That is right.

"Q. When did you leave Washington to go to Philadelphia?

"A. 1947.

"Q. 1947. Did you come down here and visit the [fol. 290] defendant?

"A. I did, sir.

"Q. Every year?

"A. Not every year.

"Q. Do you feel close with your brother? Do you feel close with your brother, friendly with him, close to him?

"A. I wanted to be, but I couldn't, the way he acted.

"Q. You would come down here every year. Did you stay with him?

"A. Yes, when I came.

"Q. Did you stay with him at 415 A Street?

"A. No; I don't think I visited him—yes; I did. I visited him once there.

"Q. How long did you stay that time?

"A. A week.



"Q. A week. Where did you stay in that house?

"A. I stayed where the rest of them stayed.

"Q. Was it on the first floor or second floor?

"A. Second floor.

"Q. What room?

"A. The back room.

"Q. The back room?

[fol. 291] "A. That is right.

"Q. I see. How big is that room?

"A. It is not so large.

"Q. Well, would you say—give us some description of how big it is.

"A. It has been quite a little bit of time. I couldn't remember how large the room was.

"Q. Let me ask you this: Would it be as long as from these railings here to the back wall?

"A. That I wouldn't say.

"Q. You wouldn't? You stayed there a week, didn't you?

"A. I did, sir.

"Q. This child you have described, Willie Lee Stewart, was a pretty bad boy, is that right, used to run away from school, skip school, is that right?

"A. He didn't go.

"Q. He did go some of the time?

"A. He go some of the time but he wouldn't stay all day.

"Q. In fact, he went to school until he left home, around 17 or 18 years old, isn't that right?

"A. Yes.

"Q. What grade was he in when he left?

[fol. 292] "A. I don't even know. He never learned nothing.

"Q. You say he never learned anything, but you know what grade he was in?

"A. He was in third grade, as far as he got.

"Q. You know he went into the military service, don't you?

"Did you hear the question?

"A. That is right.

"Q. You know he has to take an examination to go into the service, don't you?

"A. That is right.



"Q. I understand he used to pick on you, is that right?

"A. That is right.

"Q. And fought with you all the time?

"A. Yes.

"Q. Fought with his younger brother, too, didn't he?

"A. Yes.

"Q. Fought with his grandmother?

"A. Yes.

"Q. He liked to fight women and small people?

"A. He didn't care who it was.

"Q. Those are the ones you remember he fought [fol. 293] with, you, your younger brother, and his grandmother, is that right?

"A. Other peoples too, that he would see.

"Q. He was about seven years old when he threw that plate on the floor, wasn't he, the food?

"A. He was doing that from a little baby on up, kid, rather.

"Q. Little baby on up?

"A. Little kid, six or seven, as well as I remember.

"Q. You don't remember what went on before six?

"A. When I was three I could remember.

"Q. When you were three and he was four?

"A. Six.

"Q. Didn't you say you were 29 and he was 30?

"A. That is right.

"Q. You say you can remember from three, and that would make him four, is that correct?

"A. That is right.

"Q. You can remember him throwing the plate down and throwing the food away at that time, is that correct?

"A. That is right.

"Q. In your opinion, is that strange for a child of three years old or four years old, to throw his food [fol. 294] away or throw a plate on the floor?

"A. I don't know.

"Q. You don't know? Do you have any children?

"A. I do, sir.

"I have no further questions."

(The redirect examination was read by Mr. Ackerly and Mr. Carey as follows:)

"Q. You didn't see the other children that were his age and were eating at the same time, they weren't throwing their food on the floor, were they?

"A. Some of them did. I did, myself, because I saw him doing it."

Mr. Ackerly: That is all.

I would like to call to the stand, your Honor, James Erby, E-R-B-Y, whose testimony appears on 420 of the transcript of proceedings of the first trial in this case.

Mr. Smithson: Your Honor, by the same stipulation, but I omit, so that the record might be quite correct and reflected, that is in a volume known as No. 4, as of the last witnesses which Mr. Ackerly and Mr. Carey have related, and it is of the date of June 24, 1953, so that the record may reflect all of the stipulation.

The Court: You agree to that?

Mr. Ackerly: I certainly do, your Honor.

[fol. 295] The Court: Very well.

Mr. Ackerly: My associate is very thorough.

The Court: The record will so indicate.

(Mr. Ackerly read the questions and Mr. Carey read the answers in the testimony of James Erby on direct examination as follows:)

Q. Please state your full name.

A. James I. Erby.

Q. Where do you live?

A. 2164 Florida Avenue, Northwest.

Q. What is your occupation?

A. Brick mason and contractor.

Q. Do you know the defendant Willie Lee Stewart?

A. I do.

Q. How long have you known him?

A. Since 1945.

Q. And during that time have you worked with him?

A. With him, and as an employer.

Q. Have you noticed anything in his conduct when you have been around him that has been peculiar or out of the ordinary?

A. Yes; I have.

[fol. 296] Q. Would you please state to the Court and jury what acts he has committed that are peculiar?

A. Working with him I noticed his lack of memory, I would say. He does things, and then he don't know that he did it.

Q. Can you give us an example of things he has done and then didn't know he has done them?

A. As his employer he worked for me and he would throw tools he had been working with down and leave the job, and then would return as if he was coming to work, as if he didn't know he had been there already and left.

Q. Would that be on the same day or another day?

A. He would return on the same day, approximately an hour or two hours later.

Q. What other things has he done?

A. Well, we had a party at my house, he and I together, and there were approximately 15 of us on the floor dancing, and he was sitting on the couch and just out of the blue sky he put his hand under my wife's dress, like that. My wife told him to stop. He jumped and sat down, like that, and then he said he didn't know he did it.

Q. Was there a time when he was mixing mortar and asked for an increase in his pay?

[fol. 297] A. There was.

Q. What happened on that occasion?

A. He asked for an increase in pay, and I told him I would give it to him.

Q. When was that? Fix the time.

A. That was—I can't remember the date exactly but we were working—I was doing some building for Garcia Brothers.

Q. Can you fix the year?

A. 1952.

Q. How much were you paying him at that time?

A. At that time I was paying him \$12 and I increased it to \$13.

Q. How much did he ask you that it be increased to?

A. Five cents more, ten cents more an hour, I think it was.

Q. How much would that have amounted to?

A. The ten cents an hour, he was getting \$12 a day, and that would have been \$12.80.

Q. \$12.80. Did you agree to give him this increase?

A. The \$13 increase I agreed to give him.

Q. What did he then do?

[fol. 298] A. He threw the hod down, he kicked the wall down that we had built up and left. He kicked two pillars and a stoop down, and then he didn't know he had done that.

Q. You say he kicked a wall down?

A. Yes; what I mean by a wall, we built a stoop, a stoop we built on a porch, and it comes up off the ground. It is green work, can easily be pushed over if the mortar isn't set up.

Q. You said he destroyed that work that had been performed?

A. That is right.

A. Was there any other work that he destroyed at that time?

A. There was two columns going up, a support for a stairway going into a basement. He pushed one of them down.

Q. That was after you had agreed to pay him the increased wages he demanded?

A. That is right. That was after I had agreed to pay him the \$13 a day.

Q. After he had destroyed this work, what then occurred?

A. Then he left. He left the job, and I don't know if [fol. 299] he went home or not, but anyway, he left.

Q. When did you next see him?

A. The next morning.

Q. When was that? Where was that?

A. We picked him up at his home to bring him back to work.

Q. Was there any discussion with him about the work he had destroyed?

A. Yes; and he didn't know that he had pushed it down. He said he didn't know anything about he had pushed that work down, and, too, he didn't know I had given him the raise.

Q. Were there any other occasions when his actions have been peculiar?

A. On Georgia Avenue, 3200 block of Georgia Avenue, there is a recreation center, and he ripped up a couple of tables with a pool stick.

Question by the Court: Were you there?

A. I come in after the excitement had started and I asked what happened.

Mr. Smithson: I object to anything he didn't see, your Honor.

Mr. Carey: Part of the *res gestae*.

Mr. Smithson: I object to the counsel's comments in that [fol. 300] regard.

The Court: Did you read that from the record?

Mr. Carey: No, your Honor.

The Court: Then the jury will disregard the comment.

Mr. Smithson: And, for the record, the Court sustained the objection.

Conceded, Counsel?

Mr. Ackerly: Yes, sir. I would state it is sustained.

The Court: Very well.

(Mr. Ackerly and Mr. Carey continued reading in question an answer form as follows:)

Q. When you got there, what did you find when you arrived?

The Court: He is going to have to tell us what somebody else told him.

Q. Was the defendant there? Was Willie Lee Stewart there?

A. He was there.

The Court: He can tell us what anybody said to Stewart about whatever happened and Stewart's reply, but he can't tell us what he learned from somebody else.

[fol. 301] Q. When you went in there, what did you find in respect to these pool tables?

A. They had been ripped with a stick.

Q. Was there any conversation by the people in the pool room with Stewart?

A. Yes; they said—Willie Lee said he didn't rip them and they said he did.

Q. You say Willie said he didn't rip them?

A. And they said he did. He said, "James, you know I didn't rip those tables," and he was standing back against the wall.

Q. How many people were there?

A. Roughly I would say there was twenty.



Q. How many people accused him in your presence of having ripped the pool tables?

A. Five of them that actually seen it.

Q. What did he say? What did the defendant say?

A. He said he didn't do it. He said if he did he didn't know nothing about it. He say if he rip up the tables he was sorry, but he didn't do it. He say, "I know I didn't do it."

Q. Were you present at his home in November, 1952 when he had a child that was ill with a fever?

A. I was.

Q. Who else was present at that time?

[fol. 302] A. At that time there was some people downstairs. I think his wife was upstairs, went up to quiet the baby after the baby was crying with fever, and he asked her what was the matter with the baby. She say, "You know the baby is sick." He told the baby to shut up, "I will throw you out the window."

Q. Throw it out where?

A. Out the window.

Q. What did he do, if anything?

A. He walked to the window with the baby, like this, and I grabbed him by his arm and took the baby away from him.

Q. Were you present at 416 Columbia Road at the time when anything unusual occurred there?

A. I was.

Q. What occurred at that place?

A. He took his fist right in through the ceiling and said, "I will tear this damn place down." I don't know what he was upset about but anyway he put a hole in the ceiling.

Q. Did you speak to him after that about that?

A. I did, and I asked his wife to speak to him, too. She said she wasn't saying anything to him.

Q. Did you say anything to him?

[fol. 303] A. I asked him how did the hole get there. He said, "I don't know; maybe the kids pushed the hole, pushed it up there with the broom."

Q. In your opinion is the defendant, Willie Lee Stewart of sound mind or of unsound mind?

A. I don't think he got it all.



Mr. Ackerly: You may cross examine.

(The cross-examination was read by Mr. Smithson and Mr. Carey as follows:)

Q. You don't think he has it all, is that right?

A. That is right.

Q. Do you know he was in the Army?

A. I do.

Q. You know he served two hitches, don't you?

A. I don't follow you by hitches.

Q. He enlisted twice, didn't he?

A. That I don't know.

Q. Were you in the service?

A. Yes; I was.

Q. You had to take an entrance examination didn't you?

A. I did.

[fol. 304] Q. You had to pass a certain grade to be acceptable, too, didn't you?

A. No; at that time they had a private school inside the Army.

Q. I see. What did you take? Did you take that school or take the examination?

A. No; I took the examination.

Q. You don't know what the defendant, Willie Lee Stewart, did, do you?

A. No; I don't. I wasn't in the branch of service—

Q. Let me ask you this: You say on this occasion he asked you for some money in advance, you were paying him \$12 a day, is that correct?

A. That is right.

Q. And you were working a five-day week?

A. Well, we were working as well as six days—five, six, sometimes we worked seven days.

Q. In other words, then, he would always get about \$60 to \$72 a week?

A. That is right.

Q. And he asked for some more money?

A. That is right.

Q. Did you right away say, "Sure, I will give you a dollar more"?

[fol. 305] A. No; I talked to my partner, and I was going to see—he was worth it, anyway, but I told him, "I will give it to him, but I won't let anybody else hear me say it,

because they would just walk up and say they wanted more money, I gave it to him. Then I won't make any money."

Q. That is when he got mad, isn't it?

A. No; he didn't get mad.

Q. It is your story he didn't get mad until after he was given this?

A. When I told him I would give him \$13 a day—he only asked for ten cents—I told him I would give him \$13 a day. That is when he got angry.

Q. That is when he got mad, but you then went by to get him the next day, is that right?

A. Sure.

Q. You had to rebuild what he tore down?

A. Sure, I did.

Q. You had to pay for it?

A. That is right.

Q. It came out of you and your partner's contract?

A. That is right.

[fol. 306] Q. But you and your partner—it is your testimony you and your partner went by the next day to get this man to come back to work for you?

A. That is right.

Q. When you walked into this house in November, 1952, on A Street, I believe you said, you said his wife, Annie Lee Stewart, was upstairs with the baby?

A. I said she was upstairs tending to the baby. The baby was crying.

Q. You just walked into the house with the defendant, Willie Lee Stewart?

A. I didn't come into the house with him.

Q. You didn't come into the house with him?

A. When I come into the house Willie Lee was in the house, either downstairs or upstairs. When I come into the house he asked, "What is wrong with the baby?"

Q. It is your testimony you didn't go into the house with him and when you had gone in he was inquiring about the baby, is that right?

A. That is right.

Q. And where was he then?

A. When he inquired about the baby, he was at the top of the stairway.

Q. At the top of the stairway, and you were downstairs, is that right?

[fol. 307] A. I was upstairs.

Q. When did you get upstairs?

A. As soon as I went in the house.

Q. You just walked right upstairs?

A. I walks all over the house.

Q. You walk anywhere in the house you want to?

A. Any time.

That is all.

(The redirect examination was read by Mr. Ackerly and Mr. Carey as follows:)

Q. You went to get him to come back to work the next day. What type of workman was Willie Stewart when he worked?

A. He can't be beat. He is about the best worker that you can get that does this kind of work.

Q. Did he repay you for the damage that had been done that day?

A. No; I never said anything to him about any pay or anything. I didn't take it out of his pay.

(The recross-examination was read by Mr. Smithson and Mr. Carey as follows:)

Q. What is the matter? Are you scared of him?

A. Do I look like I should be afraid of him?

[fol. 308] Q. Don't you ask me a question. Answer my question. Are you scared of him?

A. No; I am not afraid of him.

All right.

Mr. Smithson: That is the close of that, your Honor.

Mr. Ackerly: That concludes that, your Honor, and I believe that concludes our presentation of these particular witnesses.

The Court: Yes.

Gentlemen, it will serve my convenience to recess for about ten minutes.

The jury please keep in mind the admonition.

(At 10:37 a.m. a recess was taken until 10:50 a.m.)

## COLLOQUY BETWEEN COURT AND COUNSEL

## AFTER RECESS

Mr. Carey: May we approach the bench a moment?

The Court: Yes.

(At the bench:)

Mr. Carey: Your Honor, we contemplate putting on the wife of the defendant for one specific purpose. That is to go into the sanity or insanity of the defendant.

Now, at the prior trial the prosecutor tried to go into true situation, and beyond the scope of the direct. His [fol. 309] position was stricken down by the Court in each case. This woman has a prior criminal record. She was convicted, as you will remember this morning, of being an accessory after the fact. We don't think any question should be allowed by the Court going into her credibility or not. The Court in a prior case agreed with the defense counsel that, inasmuch as she was put on the stand for a very limited purpose, the soundness or unsoundness of the mentality of the defendant was the only thing in issue.

And secondly, she is alleged, or by inquiry I presume the prosecutor has indicated by his questioning, that Willie Lee Stewart, the defendant, may, at one time have made some admission to her concerning this offense. And that was also objected to by the defense counsel and the Court sustained the objection, based on the one premise that this witness was on the stand for a limited, specific purpose, the soundness of mind of the defendant.

We would like to anticipate and solicit a ruling by the Court at this time as to whether you will sustain any objections by us, by the prosecutor.

The Court: Do you expect to prove any facts by her?

Mr. Carey: None whatsoever. For just one purpose alone. We are going into his peculiar behavior, as we [fol. 310] would so catalog it, during the time she was married to the man. We are not going beyond that at all.

The Court: Is that the way you proceeded before?

Mr. Carey: Yes, your Honor. I think the prosecutor will bear me out.

Mr. Smithson: In this regard, your Honor: In the trials before Judge Schweinhaut and Judge Matthews, counsel

has indicated the ruling that took place when I attempted to elicit the fact she was convicted of accessory after the fact in the first trial of June 1953, which she was in fact, I think it is conceded, convicted. He stopped me on this because Mr. Wood at that time offered her testimony as to the peculiar actions of the defendant. I disagreed with him, but since the conviction has not been approved for this defendant, I will go along with that, rather than raise any possible question of error, except for this: I do intend to examine the witness, Annie Lee Stewart, about her conviction for petty larceny, because that goes to the weight and the credibility to be given to her testimony. That conviction was subsequent to this offense and does not relate to this offense.

Mr. Carey: Well, we would object to any question about her credibility because we are putting her on for limited purpose. And I think it should be confined to that specific issue.

[fol. 311] What, your Honor, will be confirmation of things that have already been said: he punched the hole in the ceiling; he threatened to throw the baby out.

Mr. Smithson: It would be cumulative then, your Honor. I think I am entitled to show: one, her interest in the outcome of it; her relationship; and anything which would affect her credibility. It is a fact that she is relating an assumed or alleged fact, shall we say, that these events took place. A conviction is only admissible bearing on the issue of credibility and it would be for that sole purpose I would offer it.

Now, on the other matter, when your Honor has ruled on that one, I would like to discuss the other aspect of it.

Mr. Carey: You will agree with us up to the one proposition, petty larceny?

Mr. Smithson: I am going to ask about petty larceny unless his Honor stops me. I will go along with you rather than raise a question on accessory after the fact.

The Court: You think that is proper?

Mr. Carey: I must be honest with the Court. I think he is entitled to ask that question. I think credibility is always an issue. For me to argue to the contrary, I would be untrue to myself.

[fol. 312] The Court: All right.



Mr. Smithson: On the second matter, your Honor, I have a statement from this witness, Annie Lee Stewart, that on the night that this man came back after committing this crime, he called her into her bedroom, was upset in some way, indicating a tearful upset condition, stated to her that he had shot the groceryman, that he hoped that the man wouldn't die. And it was made almost contemporaneous with his return to the house, about which the witness Hamilton has already testified, that is, his return, if your Honor will recall, and his change of clothes. I think, your Honor, if she testifies, as she has in the past, that he doesn't remember doing any of these things, then I think I am entitled to bring out the fact of this crime.

The Court: Perhaps I didn't understand. I understood that you were simply going to ask her whether in her opinion he was of sound or unsound mind.

Mr. Carey: That is right.

The Court: And stop right there.

Mr. Carey: With certain peculiar behavior. I was going to establish certain peculiar behavior.

The Court: No. That is what I asked you a few minutes ago.

Mr. Carey: I misunderstood your Honor.

[fol. 313] The Court: If you were going to prove factual matters. Behavior, if you are going to do that, that is quite different; because if she testifies to factual matters, she is subject to the procedure which Mr. Smithson—that he laid the foundation for impeachment.

Mr. Carey: But we have a further basic rule of law that I am trying to invoke here, is this: that the prosecutor in his cross-examination not go beyond the scope of the direct.

Now, if the direct is restricted to these peculiar behaviors, as we allege or she will say, then I say the prosecutor has no right to go beyond the scope of that.

The Court: If you prove factual matters, she is subject to procedure that he suggests.

Mr. Carey: The relationship between any alleged admissions of his, there is nothing developed under direct of the law. I don't mind his cross-examining about whether he pushed the hole in this ceiling, whether he threatened to throw the baby out the window, whether he did a lot of the peculiar things that are already in the record. But



I don't think he has a right to go beyond the scope of that direct examination.

The Court: All right. Then you are proving facts. He has a right to impeach her.

[fol. 314] Mr. Ackerly: Your Honor, I submit one or two things I would like to get on the record. One is that Judge Matthews' ruling, I submit, is the law of the case in this proceeding. That case was reviewed by the Court of Appeals. They did not disturb Judge Matthews' ruling.

The Court: It was questioned?

Mr. Ackerly: No, it was not, your Honor, because the defendant took it up after a first conviction of first-degree. We can't question her ruling on those matters.

The Court: There is another rule of law, too, to think about. For a layman to testify to insanity, they have to state the facts and opportunities of observing, and then based upon what they have testified to, as to that opportunity, they are permitted to give an opinion.

Mr. Carey: I will agree with that.

The Court: But I understood when you came up here, you were just simply going to ask her of her opinion.

Mr. Carey: Well, I thought first I want to establish—I think the rule of law we are talking about, and I agree with the Court wholeheartedly, there should be established an opportunity to have observed this person under certain circumstances, before one can pass upon the sanity or insanity.

The Court: And then you are going to prove—

[fol. 315] Mr. Carey: So I don't think I can ask her categorically, as soon as she takes the stand: Is your husband of sound or unsound mind? Wouldn't I first have to lay the premise?

The Court: That would ordinarily be true. But if she testifies to facts, then her credibility is an issue.

Mr. Ackerly: Your Honor, there is also this: She was convicted as an accessory after the fact. That conviction of the crime has been reversed by the Court of Appeals. Judge Matthews ruled that since the principal had been reversed and the conviction no longer stood, we could not use—

The Court: That isn't what you are talking about.

Mr. Ackerly: It is right here in the record.

Mr. Smithson: We are not on that. I am going to, so

there will be no error in this record, I am going to waive that question. Only as to the petty larceny. I am going to bring out her petty larceny conviction and then we are going on the issue, if she testifies as to any facts of alleged misbehavior, misconduct or abnormal behavior of any manner, I intend to bring out that on the occasion of this crime, when she says that he would deny doing these acts, that he did not deny at that time the commission of this crime, isn't that correct?

Mr. Ackerly: That is directly contrary to Judge Mat-[fol. 316] thews' ruling.

Mr. Smithson: I agree with that.

Mr. Ackerly: That isn't the law of the case for this proceeding, your Honor.

Mr. Smithson: We are back for a retrial on this trial.

Mr. Ackerly: But the rule of the law of the case, when a court of the same jurisdiction, it stays unless it is reversed by the Court of Appeals. That point is not modified in any way by the Court of Appeals.

Mr. Smithson: I agree with you, Counsel. It couldn't have been modified. There is no way we could raise the issue.

Mr. Ackerly: It was in the record of the Court of Appeals. The Court could have commented on it.

Mr. Smithson: But their failure to comment doesn't make it the rule.

Mr. Ackerly: The law of the case is a well established doctrine. I am sure the Court is familiar with it. And it applies to the court of same jurisdiction rather than appellate jurisdiction.

The Court: But she is going to be a witness in my court.

Mr. Ackerly: That is true, your Honor, but to testify [fol. 317] in exactly the same way she did in the prior trial. I submit the rule of the law of the case is binding. It makes it applicable here.

Mr. Carey: I can't see the prosecutor insisting on raising that particular issue, because I think it does put this case in jeopardy because I think it is a very serious question of law, and I should solicit concession from the prosecutor he will not press that particular because I don't think it is of monumental interest to our case. I think you have a strong case without it.

Mr. Smithson: I concede that, Counsel. I am troubled by the problem, to be quite candid with this Court and to counsel, I am troubled by the problem. I think it is perfectly permissible. I have no question in my mind and I'd insist on this beyond any question if this were not first-degree. But knowing, shall we say, the minute scrutiny that such matters are given, should there be a conviction in this case, in the exercise of discretion I will not go into that.

The Court: All right. That settles that.

Mr. Ackerly: You will not go into the statement?

Mr. Carey: Then I understand—this is the situation, as I see it. I want to see if I have this ruling correct, or stipulation more than a ruling: that you are not going to ask about the conviction for being accessory after [fol. 318] the fact?

Mr. Smithson: Oh, no. I have conceded that earlier.

Mr. Carey: Secondly, you are not going to ask about any alleged admissions he may have made to her?

Mr. Smithson: That is correct, Counsel, but I still think I have not a free choice in this matter because of the circumstances I have related, but I am going to do it.

The Court: That is your agreement?

Mr. Carey: Your agreement is you are not going into any facts of the crime. You are going to confine yourself to the facts of the peculiar behavior and petty larceny?

Mr. Smithson: I may go into other matters, Mr. Carey, but it will not relate to this crime.

Mr. Carey: Will not relate to the thing being litigated?

Mr. Smithson: Not relate to the issue being litigated. It will not relate to the crime of homicide in this case.

The Court: You mentioned a later conviction?

Mr. Smithson: That is correct, your Honor. She did sixty days for petty larceny.

Mr. Carey: I don't think we can stop that, frankly?

The Court: I think you are right.

[fol. 319] Mr. Carey: Another thing, too, so we further understand each other: When you say the alleged crime, are you referring to robbery too? Does that stipulation encompass robbery?

Mr. Smithson: It covers this robbery.

Mr. Carey: Thank you, your Honor.

(Counsel returned to trial tables.)

Mr. Carey: Mrs. Stewart.

[fol. 320] ANNIE LEE STEWART, was called as a witness by and on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Carey:

Q. Let us have your full name, Mrs. Stewart.

A. Annie Lee Stewart.

Q. And where do you live?

A. 813 Eye Street, Northeast.

Q. And do you know the defendant, Willie Lee Stewart?

A. Yes, I do.

Q. What relationship, if any, exists between you and him and existed in 1953? What relationship are you to him?

A. His wife.

Q. How long have you been his wife, Mrs. Stewart?

A. Let me see. About eleven years.

Q. When were you married? In 1947?

A. In '46.

Q. You were married in 1946. That is twelve years. Do you have any children by the defendant Willie Lee Stewart?

A. I have five. I lost my son last year, a baby.

Q. And where have you lived during most of the twelve years that you have been married to defendant Stewart?

A. Washington, D. C.

[fol. 321] Q. Have you ever observed any peculiar behavior on the part of your husband during the period that you have been married to him, Mrs. Stewart?

A. Yes.

Q. Tell the Court and jury what those things were that you considered peculiar.

A. Well, during my pregnancy he would come in and drag me out of bed sometimes and would sit on me and beat me.

Mr. Smithson: I ask the witness to establish the date.

Mr. Carey: I am going to do that.

By Mr. Carey:

Q. What pregnancy are you referring to, during what year?

A. That was in—I am not for sure. I think it is '47; or '48. Probably was '48. I was pregnant with my second child.

Q. What did he do during this pregnancy period of 1947?

A. 'Forty-eight.

Q. 'Forty-eight, I am sorry.

A. Well, he just come in one evening, I was in bed, and he didn't say anything. Just come in and snatched me out of bed and got down on me and started beating me. Some of the tenants in the apartment house stopped him [fol. 322] and they went and got the landlady and brought her over. She was talking to him. He dropped his head and walked on out.

Q. How long were you pregnant at that particular time?

A. I guess I was about six months, I guess.

Q. Where did he beat you? What part of your body?

A. He just sit on me and cut me off around my legs across my hips, like that.

What else did he do other than that which you considered peculiar?

A. Oh, well, he—he did a lot of different things since—

Q. Tell us specifically the things that he did. This Court and this jury knows nothing about this case. We want to know everything you know.

A. Well, on one occasion he came in—I was living at a different address. This was at 417 Columbia Road, or 416. I think it was 416.

Q. When was this? Can you direct your memory to the period that this occurred?

A. Well, I guess it was about a year difference from that.

Q. Was that after the '48 or before?

A. Yes, it was.

Q. So '49, is that correct?

A. Along in there.



[fol. 323] Q. You are living at 417 Columbia Road, is that correct?

A. I think it was 416.

Q. 416?

A. Yes.

Q. Tell us what occurred at that time.

A. Well, one evening he came in from work and I was laying across the bed reading a True Story book. And he came in, just walked in the house, and just took his fist and like that and punched a hole through the wall. You see, we were living in the basement apartment and the ceiling was very low.

Q. Was this a one-room apartment in which you lived?

A. It was two rooms and kitchen. I asked him what was he doing. He didn't say anything. He just went on in the back room and sit down. And he was rubbing his hand.

Q. Keep your voice up.

A. So I didn't say any more to him. I just kept on reading. The next morning when he woke up he asked me what was wrong with his hand. I showed him what he had done. He swore he hadn't did it. The landlord also said he did. He swore the children had did it. He told me the kid had did it.

Q. Willie Lee Stewart said the children had done it?

A. That is right. I told him he had come in and did it with his fist. He said the baby did it with the broom. He wanted to whip the child. I told him he couldn't whip; [fol. 324] because he had did that himself. He swore to the landlord he didn't.

Q. How big a hole did he put in the ceiling?

A. Just a fist hole.

Q. Did you and he have any harsh words prior to his sticking his fist in the ceiling? Did you and he have any harsh words before he did that?

A. Not any at all. He just came in and did that.

Q. What else did you observe of the peculiar behavior during the period you were married to him?

A. Well, on one occasion, this was at 415 A Street, North-east, he came in and—

Mr. Smithson: Objection, unless the time is set.

Mr. Carey: First let her get started and then I will pick up the time.



Q. One time at 417 what—

The Court: I think you should fix the date before she tells what happened.

By Mr. Carey:

Q. This episode you are going to talk about that occurred at 417 A Street, Northeast, when was the time that this occurred?

A. You mean what date?

Q. Yes. Approximately. What year?

A. Let me see.

Q. Was it after the '48 or '49, or was it earlier?

[fol. 325] The Court: Let her think a minute.

Mr. Carey: I am sorry.

A. It was after that. It was in, I believe it was '50 or '51.

Q. You know what time of the year it was? Was it in the summer or spring or fall or winter?

A. I think it was, I am not for sure, but I think it was in the summer.

Q. December?

A. In the summer.

Q. Oh, in the summer. I am sorry. All right, in the summer of 1950 at these premises at 417 A Street what occurred?

A. Well, on one occasion he came in the baby was crying. He came upstairs and grabbed the baby and started to throw it out the window. And I think it was my sister and Robbie that stopped him.

Q. Who was Robbie?

A. Robbie Lee Coleman.

Q. Is that a male or female?

A. A female. The baby was in her room.

Q. Was the baby doing anything at that time?

A. Nothing but crying. He said he couldn't stand that noise. Couldn't stand that screaming and crying. And they stopped him.

And when you stop him from doing these things, he [fol. 326] just drops his head and walk away.

Q. Did he attempt to fight with these two women who attempted to stop him from throwing the baby out the window?

A. No, I don't think so.

Q. Was this in the same apartment that you were living in in March 1953?

A. Yes, it was. Same house.

Q. What floor did this occur on?

A. Second floor.

Q. Now, what else of a peculiar nature did your husband do other than the three things you have mentioned?

A. Well, on another occasion he started to throw the baby in the burning stove and that time me and my sister stopped him.

Q. Just a moment. When was this?

A. All of it was done in the same year.

Q. 1950?

A. Yes.

Q. Summer?

A. Yes, it was.

Q. Now, tell us about the baby and the fire.

A. Well, he come up and just grabbed the baby up and started to put it in the burning stove and my sister and I stopped him. We had to struggle with him that time to take the child from him. Then he walked on out. He didn't [fol. 327] say anything. He went around in my room, and he sit down with his head hung down. Didn't say anything.

Q. Was the baby doing anything at that time, Mrs. Stewart?

A. No, it wasn't.

Q. The baby was not crying or anything; is that correct?

A. No; it wasn't.

Q. Had you ever had any words with him prior to his threatening to throw the baby in the fire?

A. Yes, I did.

Q. What were these words about? What caused these words between you?

A. You mean before? I mean afterwards.

Q. Oh; afterwards?

A. Yes.

Q. Did you have any fight with him after he had threatened to throw the baby in the fire?

A. No, I didn't.

Q. Can you recall anything else, Mrs. Stewart, of a peculiar behavior on the part of your husband?

A. Yes. I don't know the exact date but I think this was, but I am not sure the same year or not, but on another occasion in the same address, he just come in the room, I was sitting in the room, and looked under the bed. He [fol. 328] grabbed all the dishes we had in a box and went to the window and threw all the dishes out, cut up his new hat, and threw his shoes out the window, and went on downstairs.

Q. Did he say anything while he was doing these things?

A. No.

Q. Breaking up the dishes and cutting his new hat?

A. No, I didn't say anything to him at that time. Because I was kind of afraid to get in the way. I didn't bother him. I didn't say anything.

Mr. Smithson: I object to her impressions, of what her fear is. It is only what she is supposedly relating as to him.

The Court: Yes.

By Mr. Carey:

Q. Whose dishes were these?

A. They was mine and his.

Q. Did he say anything after he had done these things?

A. Yes; he didn't know he had broke them all up.

Q. Did you ask him about it?

A. Yes, I did.

Q. What did he say?

A. He said he hadn't did that. Then he wanted to know what happened to his hat. I said he had cut up his hat and he didn't believe he did that.

Q. Was he drinking during these times that he did these peculiar things?

[fol. 329] A. Not as I knows of. I never seen my husband drink over twice.

Q. What else can you recall, if anything, of a peculiar behavior on the part of your husband?

A. Well, during Halloween night—

Q. What year is that?

A. Just before this accident happened. It was on Halloween night.

Q. This would be '52; we are talking about?

A. I can't recall the year. During the year he was arrested.

Q. He was arrested in 1953.

A. Well, this—

Q. So it would have to be the Halloween before that; is that correct?

A. Halloween just before he got arrested.

Q. That would be Halloween of '52; is that correct?

A. That's right.

Q. What occurred at this particular time?

A. Well, I was sitting up there in the room with my baby in my lap and my husband came in, Willie Lee Stewart.

Q. Keep your voice up. You are getting a little low.

A. I was sitting on the bed holding my baby and my husband came in the room, stopped right—just walked in the door, and he pulled out an Army .45. And told me don't [fol. 330] I move. And I didn't understand what he mean by don't move, because I hadn't done anything to him. And I stood up and asked him where did he get the gun from, and he pulled it and shot it right in my face. I thought he had shot me but he hadn't. So then he told me to drop the baby. So I dropped the baby. Then he told me don't bend down. He turned around and walked out the room. I thought I was shot. I run to the mirror to see if there was a hole in my face but I didn't see any place I was shot. But I was just deaf in the head. And I just knowed I was hit and looking to fall. So my sister ran upstairs crying, "Annie," and she said, "Has Willie shot you?" And I said no. And she runs, started looking. She said, "Oh, he shot you somewhere." And he walked on downstairs and he was standing downstairs there. And my brother ran up to him, the baby boy, and said, "Have you shot my sister?" He said, "No, I haven't shot your sister. I haven't nothing to shoot her with."

My brother, he came up crying and turned me around, looking to see could they find a hole that he had shot me, and somebody called the police, I don't know who it was, but I think it was the next-door neighbor called the police.

Mr. Smithson: This all is objectional, your Honor. The whole thing is complete hearsay.

The Court: Sustained. Just tell what you know.

By Mr. Carey:

Q. After this shooting did somebody arrive at the apartment [fol. 331] ment?

A. Yes, it did.

Q. Who was that?

A. I don't know. It was so many policemen, I don't know.

Q. There were police there; is that correct?

A. Yes, there were.

Q. What, if anything, did the police do at that time?

A. Well, they come in and asked me had—

Mr. Smithson: Objection. I think the question is what they did. It is hearsay otherwise.

Mr. Carey: I agree with the prosecutor.

Q. Did the police have a conversation with you at that time?

A. Not right then.

Q. When?

A. After they arrest him. Then they come back. They sent a detective.

Q. What did the police do when they arrived at the apartment?

A. They came up in the room and looked around for the bullet hole and they asked for the pistol.

Q. Did they see the bullet hole?

A. No, they couldn't find it.

Q. What did they do then? <sup>Now</sup> A. tell us what they did, [fol. 332] not what they said.

A. After they come up, they asked me had my husband shot at me. I told them no, because I didn't know what to do. I had children by him. I was afraid if they did take him from me, I didn't know how I was going to live. I told them no.

Mr. Smithson: I object to what she says her feelings were.

The Court: Yes. The question was what did they do. Wasn't it?

Mr. Carey: That is correct, your Honor.

The Court: Tell what they did. Not what they said.

By Mr. Carey:

Q. Don't tell us any conversation, Mrs. Stewart.

Now, did the police do anything to Willie Lee Stewart at that time?

A. Yes. They find the pistol and took him on to No. 9 precinct.

Q. How long was he away from your premises on this particular night?

A. One hour.

Q. Did he return?

A. Yes, he did.

Q. Did you ever go to court about that?

A. No, I didn't.

Q. Did the police ask you to go to court?

[fol. 333] Mr. Smithson: Objection. It is hearsay.

A. No.

Mr. Smithson: I don't believe it relates to this, your Honor.

The Court: Sustained.

A. Well, when they arrested him they sent a detective back out to ask me some questions.

Mr. Smithson: Objection, your Honor.

The Court: Wait a minute.

Mr. Smithson: The witness is insisting on testifying about something your Honor sustained the objection to.

The Court: You just wait for the question. Answer the question; nothing else.

The Witness: All right.

By Mr. Carey:

Q. Mrs. Stewart, after your husband left the premises and went to the precinct, did someone else from the police come to see you?

A. Yes, they did.

Q. Did you know who that was?

A. No, I don't know.

Q. Did he identify himself by name?

A. He might have but I was so confused, I can't remember.



Q. At this time are you able to recall his name?

A. I don't think I can.

[fol. 334] Q. Was he a white man or a colored man?

A. It was two white detectives.

Q. Were they in uniform or not in uniform?

A. Plain clothes.

Q. After you had this conversation with these two men who identified themselves as detectives, what, if anything, did you do?

A. I just told them what I knew about my husband.

Q. Did you do anything?

A. No, I didn't.

Q. What did they do?

A. Well, he just talked to me about it.

Mr. Smithson: Objection.

By Mr. Carey:

Q. No, no. You can't tell us any conversation.

The Court: There is a difference between talking and doing.

The Witness: Oh, I see.

By Mr. Carey:

Q. After you had the conversation with these two detectives what did the detectives do?

A. They left.

Q. Did you have occasion to see them again about this shooting episode in your apartment on Halloween evening?

A. No, I didn't.

Q. Where was Willie during the time? Willie then re-  
[fol. 335] turned, is that correct?

A. Not until after they left. Then they released him.

Q. What else, if anything, can you recall other than these four or five items you have told us about his peculiar behavior?

A. Well, on one occasion he had the porch tore down at 415 A Street, Northeast.

Q. When was this? Keep your voice up.

A. I can't recall the year.

Q. Would it be before Halloween of '52 or after?

A. I believe it was after.

Q. And what about the porch?

A. Well, they had the porch taken down because the fence was rotten. They had to tear the porch down.

Q. Who did this?

A. My brother.

Q. Your brother took down the porch?

A. Willie's aunt.

Q. Did Willie help them at all?

A. No, he didn't.

Q. They took the porch down, and tell us what peculiar behavior, if any, that Willie did at that time.

A. Well, everybody was supposed to use the basement to come out. Not, you know—because they couldn't use the door.

[fol. 336] Mr. Smithson: Objection to the explanation. What if anything that he did that was peculiar, if anything.

The Court: Just tell what he did.

A. Well, jumped across the door instead of going in and coming out the basement; he pulled the nails out to jump out the door.

Q. Why was it necessary to pull the nails out of the door?

A. I don't know.

Q. Was the door nailed?

A. Yes, it was.

Q. And how were you able to get out of that house with the door nailed?

A. Go through the basement.

Q. And how did you go out.

A. Through the basement.

Q. How did the other people who were in this house get out?

A. Through the basement.

Mr. Smithson: Objection. If she wasn't with them.

Mr. Carey: If she says she doesn't know, then obviously she wasn't with them.

Q. How did the other people in this house get out?

A. Through the basement.

[fol. 337] Q. Did you see these people go out?

A. Yes, I did.

Q. How did Willie Lee Stewart go out?

A. Jumped across the front door there.

Q. And how much of a jump was it?

A. Well, I guess about as wide as this space along in here. From these steps across.

Q. How long a period of time were these steps and post removed from the house?

A. I think it was a little better than a month.

Q. And how did Willie come in the house?

A. Well, he would jump in from the entrance, walk the thing and jumped in the doorway.

Q. He come in the same way he went out?

A. Yes, he did.

Q. He jumped in and he jumped out?

A. That is right.

Q. Did you ever talk to Willie about this?

A. Yes, I did.

Q. What did Willie say?

A. Well, he just said that was the way he was going out the house. He just said that was the way he was going out.

Q. And did you criticize him for going out—

[fol. 338] Mr. Smithson: Objection. That has nothing to do with this.

A. Yes, I did.

The Court: Yes. Sustained.

By Mr. Carey:

Q. Is there anything else you can remember, Mrs. Stewart, other than those things you have told us about your husband's behavior?

A. I think that is about all.

Q. You want to think for a moment and see if you can remember anything else?

Can you recall anything else, Mrs. Stewart?

A. I believe on one occasion he jumped from my sister-in-law's window.

Q. The last jurors down in that corner, they have to hear everything you say. Keep your voice up, please.

What about the window?

A. One occasion instead of going out through the door he came out through the window.

Q. Where was this?

A. 415 A Street, Northeast.

Q. When was this?

A. That was during the same year he was jumping from the porch.

Q. And he come out the window?

A. Yes, he did.

[fol. 339] Q. Did he have a parachute?

A. No.

Q. What else do you remember?

A. That is about all I can recall.

Mr. Carey: Your witness, Mr. Smithson.

Mr. Smithson: Will your Honor indulge me a moment?

The Court: Yes. We will recess for ten minutes.

The jury please keep the admonition in mind.

The Marshal: This Honorable Court stands recessed for ten minutes.

(Thereupon, at 11:27 a.m. a recess was taken until 11:37 a.m.)

#### AFTER RECESS

Mr. Smithson: Shall I begin, your Honor?

The Court: Yes. You may cross-examine.

#### Cross-examination.

By Mr. Smithson:

Q. Now, you are the wife of the defendant; that is correct?

A. That is right.

Q. Been married to him since 1946?

A. That is true.

Q. And I believe you have related to the ladies and gentlemen of this jury and the Court that while you were living at 416 Columbia Road in '47 or '48, that you were pregnant with your second child and he jumped on you and beat [fol. 340] you, is that right?

A. No.

Q. Isn't that what you told the ladies and gentlemen?

A. No; I said at 416 Columbia Road when he stuck his fist in the wall.

Q. Didn't you likewise tell us it was at 416 Columbia Road, just a few minutes ago, that he allegedly beat you?

A. I don't think I said 416 Columbia Road.

Q. That is your recollection, is that correct, at this time?

A. I don't think so, because I was living at Water Street during that time.

Q. All right. Now, on this particular occasion that the man, the defendant, shot at you, you say he stuck the gun in your face?

A. It wasn't right in my face. I was sitting on the bed. He was standing in the doorway.

Q. The gun went off?

A. No. He pointed at my face.

Q. Did you tell us he shot at you?

A. Yes, he did.

Q. The gun went off?

A. He pulled it.

[fol. 341] Q. There was an explosion, is that right?

Mr. Carey: She has testified to that. The gun went off.

The Court: This is cross-examination.

A. Well, he shot. That is all I know.

The Court: Answer the question. Was there an explosion?

A. I mean—what would that mean?

By Mr. Smithson:

Q. In other words, was the gun discharged?

A. Yes.

Q. Was there an explosion from the firing of a cartridge?

A. Yes.

The Court: She doesn't know what you mean, perhaps, by "an explosion."

Mr. Smithson: That is correct, your Honor.

Mr. Carey: He is a little too technical for the witness, your Honor.

Break it down to simple language.

By Mr. Smithson:

Q. So the gun was discharged, that is your testimony?

A. Yes.

[fol. 342] Q. You were inside of the house, is that correct?

A. Yes.

Q. Now, your husband used to drink too, didn't he, while you were living with him?

A. I only saw my husband drink twice.

Q. He used to drink on the week-ends, didn't he?

A. Beer.

Q. Only beer?

A. That is right.

Q. I see. And on one occasion he was rather intoxicated in 417 A Street, isn't that right?

A. I don't know anything about that.

Q. You don't know anything about him being intoxicated in there and getting in any trouble at 417 A Street?

A. No; I don't.

Q. Do you know anything of him talking to Mr. Hamilton about that?

A. No; I don't.

Q. Now, this space, would you say that your husband would jump across—this was where the steps were taken away, is that it?

A. The porch.

Q. The porch?

A. Yes.

[fol. 343] Q. Were there any steps up to that porch?

A. No; the cement running up to it.

Q. A what?

A. Just a cement yard.

Q. A walk or a yard?

A. Just small yard, I would say.

Q. I see. And you say he would jump from this ledge over to where the pavement was?

A. That is right.

Q. And it was the distance from the edge of that seat to the wall, is that your testimony?

A. That is right.

Mr. Smithson: Will counsel stipulate roughly six feet?

Mr. Ackerly: Oh, no.

Mr. Carey: Absolutely no. You are exaggerating, Mr. Smithson.

Mr. Smithson: I am exaggerating, was that the comment?

Mr. Ackerly: Yes, that was the comment.



Mr. Smithson: Exaggeration?

Mr. Ackerly: Exaggeration by counsel.

Mr. Carey: Get a tape measure and be specific.

[fol. 344] By Mr. Smithson:

Q. And this would be boarded up, is that right?

A. Yes, sir; it was.

Q. And you would be downstairs and he pulled the nails loose from the boards and jumped out?

A. No; I lived on the second floor.

Q. So you don't know whether he pulled them out or not?

A. Yes, I do.

Q. From what someone else told, isn't that right?

A. No; it is not.

Mr. Carey: Just a moment; let her answer the question. You cut her off.

By Mr. Smithson:

Q. Had you finished the answer?

A. The first time he tore the nails off I was coming down the steps behind him.

Q. The first time. Of your own knowledge, did he tear them off any other times?

A. Well, I couldn't say for sure. I don't know that because I saw him the first time he jumped out.

Q. It's one time you are talking about he pushed either the wood away or tore the nails off and jumped across, is that right?

A. That is true.

[fol. 345] Q. And, of course, there were a number of people living in this house 415 A?

A: Yes, there was.

Q. And rather go out through the basement, he pushed the board aside and jumped across?

A. He did.

Q. And of course you were standing there waiting for him to come back and jump across to come in, weren't you?

A. No; I wasn't waiting for him.

Q. Did you see him jump across to come in?

A. That is what my sister-in-law says.

Q. Oh—

Mr. Carey: Just a moment. You cut her off.

The Court: Answer the question.

A. I said no, my sister-in-law is the one said he jumped in. I didn't see it.

Q. It's what your sister-in-law told you about his jumping habits since March 12 of 1953, isn't that correct?

A. I think so.

Mr. Carey: Since '53 he has been in jail. How could he be jumping out?

Mr. Smithson: I don't believe counsel is testifying. I have asked the witness what it is her sister-in-law has told her about his jumping habits since 1953, March 12.

[fol. 346] Q. That is what you are testifying to, isn't it?

The Court: Go ahead and answer.

A. I don't know what year it was. I know it was during the time before he got arrested.

Q. Well, now, at the time that you and he were having this little discussion when he had the gun, you were cussing him, weren't you?

A. I was doing what?

Q. You were cussing him, to use the vernacular, cussing him?

A. No, I was not.

Q. You were not?

A. No; I was not.

Q. Was he cursing you?

A. No; he was not. Only two peoples in the room. Just me and my husband. Nobody else knows anything about it.

Q. Were you not asked these questions and didn't you make these answers—

I am referring, gentlemen, to page 327, transcript dated June 23rd of 1953.

Mr. Carey: First or second trial?

Mr. Smithson: First.

Mr. Ackerly: Can I have the page number again?

Mr. Smithson: 327, beginning on 326, for continuity.

[fol. 347] Q. "Was there an occasion when you were married there on A Street when your husband pulled a gun on you?"

"Answer: Yes; he did.

"Question: Tell the Court and jury about that.

"Answer: That was in—on Halloween night in 1952. He came in and I was sitting on the bed, and he come in and started arguing with me, for no reason. I wasn't doing anything. He kept cussing me, and nasty names"—from the record, your Honor—"You bitch, you are no good." I said, 'Willie, why don't you go on. I haven't done anything. What is the matter with you?' He just looked like he was staring, just wanted to fight anything. Then I told him, I said, 'You better go on before I get mad. I don't want to get mad. I don't want to bother you, because you can't fight me.'

"Then he kept on cussing me. I cussed back. When I cussed him back he said, 'Don't cuss me.' I cussed him again. He said, 'I ought to kill you.' I said, 'You got it to do.'"

Isn't that what you testified to?

A. Some of that, if I testified to it, I don't remember it.

[fol. 348] Q. You don't remember it?

A. No; I don't.

Q. Tell me, Mrs. Stewart, you were married to the defendant in 1946, is that right?

A. That is right.

Q. You have related to the ladies and gentlemen of this jury and the Court certain alleged actions of the defendant up to the time of March 12th of 1953. Did you take the defendant to the D. C. General Hospital, then known as Gallinger, for purpose of any mental observation?

A. No. I called them and they came out—

Q. No—

Mr. Carey: Just a moment.

Mr. Smithson: Your Honor, may I have the question answered in the form in which it is stated, and she may explain if she needs to.

The Court: Yes. You must answer the question put you. Read the question.

Mr. Carey: I think she wants to explain it to your Honor.

The Court: First answer it.

Mr. Carey: Then explain it.

The Court: Yes. This is cross-examination.

[fol. 349] Mr. Smithson is entitled to answers to his question.

Mr. Smithson: Thank you.

The Witness: I did not.

By Mr. Smithson:

Q. You did not?

A. No; I did not.

Q. You have lived here about twelve years, haven't you, as of March 12, 1953?

A. No; I came here in '42.

Q. Eleven years. You were here from '42 to '53, is that correct?

A. That is true.

Q. I see. How old are you, Mrs. Stewart?

A. I am 32.

Q. You are 32?

A. That is right.

Q. So five years ago, you were 27?

A. That is right.

Q. And you have lived here since you were 16?

A. That is true.

Q. Did you attend school here?

A. No, I didn't.

Q. So you came here, didn't attend any school from the time you were 16 in the District?

A. No; I didn't.

[fol. 350] Q. I see. And did you know the defendant Willie Lee Stewart in his home, Saluda, South Carolina?

A. No.

Q. You didn't meet him until he came here?

A. That is right.

Q. And let's see, Willis Daniels is your brother, isn't he?

A. That is true.

Q. And it was with him that you lived, isn't that correct?

A. That is right.

Q. It was his place that Willie Lee Stewart allegedly jumped out of the door?

A. That is right.

Q. And it was in his place that he allegedly jumped out of the window, is that correct?

A. That is right.

Q. And it was in his place that he allegedly took a shot at you, is that correct?

A. That is right.

Q. And the defendant is the father of your five children?

A. Yes, he is.

Q. And you want to do what you can to help the defendant, don't you?

A. Well, I wouldn't talk against him and I wouldn't talk for him. I am just telling what I know about him.

Q. Tell me, Mrs. Stewart—

Mr. Smithson: Would your Honor indulge me just a moment?

Q. Are you the same Annie Lee Stewart who on December 11, 1957, was arrested and convicted of petty larceny?

A. Yes; I was.

Mr. Smithson: Your witness.

Redirect examination.

By Mr. Carey:

Q. Mrs. Stewart, you were asked the question by the prosecutor and he interrupted you and didn't allow you to answer the question—

Mr. Smithson: I object to the characterization. I believe the Court has ruled on the question as being proper to be answered and then explained, and I object to the remarks of counsel and ask that they be stricken.

The Court: That is correct. Ask her a question.

By Mr. Carey:

Q. He asked you a question, in which he said you have lived with this man from 1946 until March 12, 1953?

A. That is right.

Q. Then he went on and suggests to you that you lived [fol. 352] in the District and why didn't you do anything about this man's peculiar behavior. You remember that question?

A. Yes.

Q. You remember he asked why did you do or didn't you do?

A. That is true.

Q. You started to say something. What was it you were going to say.

Mr. Smithson: Objection to the question, your Honor. It is not proper redirect examination. The question was asked did she or did she, did she make a report or attempt to take him.

The Witness: I told you.

Mr. Carey: You seemed to be terribly worried about getting an—

Mr. Smithson: Your Honor, may I finish?

Mr. Carey: He cuts me off too, your Honor.

Mr. Smithson: I am not now, Counsel.

I do not believe his examination or his proffer to the witness to make a free and gratuitous statement at this time would be proper recross-examination. The sole question that I asked was did she take him to any hospital to have any mental observation, to which she answered no.

Mr. Carey: That is not the precise phraseology. As I [fol. 353] recall the question, in substance, was what, if anything, did you do despite this—

The Court: Gentlemen, the Court will take the answer.

By Mr. Carey:

Q. Do you recall what you were going to say before Mr. Smithson interrupted you?

A. I called D. C. General and they came in an ambulance for him.

Q. When was this?

A. I can't recall the year. But he just had this terrible crying spell and he just start crying. He said, "I won't be here long with you and the children," and I thought, I know something—

Mr. Smithson: Objection to what she thought.

Mr. Carey: You opened the door.

The Court: Wait a minute.

Mr. Smithson: It's not what she thought.

The Court: The jury will disregard her statement as to what she thought.

Now, you just testify to what you saw and know; not what you think.

The Witness: All right.



By Mr. Carey:

Q. You called the D. C. General Hospital and an ambulance came to your home, is that correct?

[fol. 354] A. Yes; they did.

Q. Because Willie was having a crying episode, is that right?

A. That is right.

Q. Tell us what happened then.

A. Well, the doctors came and they gave him a shot and gave him some medicine and told me he needs a rest.

Mr. Smithson: Objection to what she was told by any other source.

The Court: Sustained.

You may just tell what you saw.

The Witness: I was there. I said the doctors told me to keep him in bed.

Mr. Smithson: Your Honor, may I be heard for a moment? Counsel is standing by the corner of the jury and has made the statement that I am afraid of this question; I am afraid of the answer. I make that statement in open court for the record. If counsel cares to deny it, I would like to be heard at the bench.

Mr. Carey: I don't deny it.

Mr. Smithson: Then I think his remarks are uncalled for.

The Court: Gentlemen, proceed with the witness now.

[fol. 355] By Mr. Carey:

Q. The doctors gave him a shot?

The Court: I would not be quite so close to the jury.

Mr. Carey: Okay, your Honor.

Q. What happened? What happened then, Mrs. Stewart?

A. Well, I just put him to bed like they asked me to do. They helped me got him in bed. And kept him in bed for about three days.

Mr. Carey: That is all.

Mr. Smithson: Nothing else.

The Court: Step out, please.

Mr. Ackerly: You may step down, Mrs. Stewart.

(The witness stepped down.)

Mr. Carey: Mrs. Coleman, Mr. Marshal.

ROBERT LEE COLEMAN was called as a witness by counsel for the defendant and, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ackerly:

Q. Will you state your full name, please.

A. Robert Lee Coleman.

The Court: The first?

The Witness: Robert Lee Coleman.

The Court: Robert?

Mr. Ackerly: Robert Lee, your Honor. Robert Lee [fol. 356] Coleman. Two separate words.

Q. Keep your voice up and speak slowly, if you can, so we can hear you way back here.

Where do you live, Mrs. Coleman?

A. 419 Q Street, Northwest, Apartment one.

Q. Did you at any time live at 415 A Street, Northeast?

A. I did.

Q. When was that, please?

A. I moved from there in '53. July '53.

Q. When did you move to that address?

A. I moved there '49.

Q. You know the defendant Willie Lee Stewart?

A. I do.

Q. You see him here in court?

A. I do.

Q. Is he sitting over here at the table?

A. Yes.

Q. Was he living at 415 A Street at the same time you lived there?

A. He moved there after I moved there.

Q. Did you live on the same floor?

A. Yes.

Q. What floor was it, Mrs. Coleman?

A. Second floor.

[fol. 357] Q. How many rooms are on the second floor?

A. Two rooms and bath.

Q. Was there anyone living with you?

A. My husband and my kids.

Q. How many children do you have, Mrs. Coleman?

A. I have eight now.

Q. How many did you have while you lived at 415 A Street?

A. Four.

Q. You and your husband and four children lived in one room?

A. That is right.

Q. And who lived in the other room, please?

A. Stewart and his family.

Q. And what did his family consist of at that time?

A. You mean—What do you mean?

Q. Was his wife with him?

A. Yes.

Q. Annie Lee Stewart?

A. Yes; and his kids.

Q. And how many children at that time, if you remember?

A. Four, I think.

Q. Did you use the same kitchen?

A. Yes; we did.

[fol. 358] Q. Did you use the same bathroom?

A. Yes; we did.

Q. Now, during the time that you lived at 415 A Street did you see the defendant Willie Lee Stewart and his family quite frequently?

A. Yes.

Q. Did you at any time notice anything peculiar or unusual about the behavior of Willie Lee Stewart?

A. I have.

Q. Will you tell us, first, please, what it was you saw, trying to give us as well as you can the date, at least the year, and perhaps the month. You understand what I mean?

A. Well, I don't exactly know the date and I don't know the month. But it run from, I say '52 to '53.

Q. You mean there was a period there of general peculiar behavior, is that correct?

Mr. Smithson: I believe counsel is testifying.

The Court: Yes. Objection sustained.

By Mr. Ackerly:

Q. Mrs. Coleman, will you try to tell us, please, what incidents or what unusual occurrences you saw the defendant do or commit?

A. Well, once we were in the kitchen, his wife and Mrs. Daniels and myself, and he came in—well, he had asked his sister-in-law, Mrs. Daniels to keep her food out of the [fol. 359] refrigerator. So she had some food in the refrigerator and he went there and threw it out on the floor and he took his fist and beat the refrigerator and beat it in until it almost came off the hinges.

Q. He beat the door of the refrigerator with his fist until—

The Court: Don't repeat the answer, please.

A. That is right.

Mr. Ackerly: Your Honor, I can't hear her very well back here.

The Court: Come around here a little closer.

Mr. Ackerly: I figured if I can hear her, then the jurors can hear her.

The Court: You keep your voice up then.

By Mr. Ackerly:

Q. Take your hand away from your mouth and try to speak to me. If I hear you, then I know the jurors hear you.

Did the door come off the hinges?

A. It didn't exactly come off that time when he did it. But we continued using it, it did come off the hinges.

Q. Did you have any occasion to discuss this incident with Willie Lee Stewart thereafter?

A. No; I just told him he shouldn't have did it. That is all.

Q. Did he make any reply?

[fol. 360] A. He said he had asked them to keep the food out.

Q. Now, did the defendant Willie Lee Stewart ever make any personal advances to you?

A. Yes.

Mr. Smithson: I believe counsel should not lead the witness quite so much.

The Court: Yes. Sustained.

Put another question.

By Mr. Ackerly:

Q. What, if anything, did the defendant do to you, Mrs. Coleman?

A. Well, several times he have come in. My husband, we might be laying down in bed. He would open the door. If you don't open the door as quick as he wants you to, well, we had a little night-latch on the door, he would shake it. If you shake the door, it would come open. He have come and said several times what he was going to do to me. He was going to get in the bed with me and what he was going to do.

Q. Without going into details, can you tell us what the suggestion was?

A. He wanted to have relations with me.

Q. Sexual relations?

A. That is right.

Q. How did he treat his children?

A. Well—

[fol. 361] Q. During this period, Mrs. Coleman.

A. As far as I know, it was off and on.

Q. Did he at any time, if you know, put his children out of the room?

The Court: Counsel shouldn't suggest answers.

Mr. Ackerly: Your Honor—

The Court: Let the witness tell what she knows.

A. Well, just like I said on my statement, what I said, I still say it. He have, and I have carried the kids around in my room to the fire.

Q. I am sorry; I didn't hear you.

A. I say he have locked the kids out the room several times and I have carried them around in my front room to the fire.

Q. To the fire?

A. In my front room, yes.

Q. Would this have been in the cold weather or warm whether?

A. It was cold weather. Naturally if you have fire, it have to be cold.

Q. You say he locked them out?

A. Yes.

Q. Was there any heat in the area where the children were put?

[fol. 362] A. In my room, sure.

Q. Where did he put them when he locked them out?

A. Outside in the hall. The hall next to the bathroom, in between the bathroom and his room.

Q. Was there any heat out there, Mrs. Coleman?

A. No.

Q. Would the children be dressed with their winter coats?

A. They didn't have on no winter coats.

Mr. Smithson: Counsel is still testifying.

A. They were just dressed ordinarily.

The Court: Counsel must let the witness tell what she knows without suggesting answers.

Mr. Ackerly: I appreciate that, your Honor.

The Court: No. No argument.

By Mr. Ackerly:

Q. Would you tell us how they were dressed when he put them out in the hall?

A. They was dressed ordinary, just like I am now. Just in the plain clothes.

Q. Did this happen in the day time or the night time?

A. It happened in the daytime.

Q. Did it ever happen at night?

A. As far as I know, I can't recall.

The Court: Your voice, keep it up.

[fol. 363] The Witness: I said I can't recall.

By Mr. Ackerly:

Q. Do you recall any other peculiar behavior on the part of this defendant during the time that you lived at 415 A Street, Northeast?



A. No. Whatever I said is on my statement. And it been so long, I can't remember.

Q. How far did you go in school, Mrs. Coleman?

A. I went to the seventh grade.

Q. And you have testified in this proceeding twice before?

A. That is right.

Q. Is that the statement you are referring to, your prior testimony?

A. That is right.

Q. And Mr. Smithson was the prosecutor in those prior trials, was he not?

A. That is right.

Q. And he heard your testimony?

A. That is right.

Q. Mrs. Coleman, in your opinion do you think that this man is sane or insane?

A. Well, I am not a psychologist, Lawyer, and I wouldn't know. I mean but from his ways and he act at the house, there are several times, a man of ordinary sense wouldn't [fol. 364] have done the things he did do.

Q. You think he was normal or abnormal?

A. Well, at times I would say he was abnormal.

Mr. Ackerly: You may cross-examine.

Cross-examination.

By Mr. Smithson:

Q. He used to drink sometimes too, didn't he?

A. Who me?

Q. No. He did?

A. Yes.

Q. And he would be drinking some of these times when he acted as you have described, isn't that true?

A. Well, I guess on occasion he had.

Mr. Smithson. That is all.

The Court: You may step out.

(The witness stepped down.)

Mr. Carey: Miss Betty Whorton, Mr. Marshal, please.

BETTY WHORTON was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

Direct-examination.

By Mr. Carey:

Q. What is your full name, please?

A. Betty Whorton.

The Court: Last name?

[fol. 365] The Witness: Betty Whorton.

Mr. Carey: W-h-o-r-t-o-n, your Honor.

Q. Is it Miss or Mrs.?

A. Mrs.

Q. Mrs. Whorton, what relation are you to the defendant Willie Lee Stewart?

A. Sister-in-law.

Q. How long have you been his sister-in-law?

A. Oh, approximately twelve years.

Q. Have you ever lived with Willie Lee Stewart and your sister?

A. Well, not exactly lived with them. But we have been very close.

Q. Have you had an opportunity over the period of time that you have known Willie Lee Stewart to have observed his conduct and behavior?

A. Yes; I have.

Q. What, if anything peculiar, did you observe on the part of the defendant Willie Lee Stewart during the time you knew him between '47 and '53?

A. Well, approximately in—I think it was '48, between '47 and '48, Mr. and Mrs. Stewart had a first born, which was a little boy, Willie Lee, Jr. And once the baby—I were there, I was in their home.

[fol. 366] Q. Where were they living at the time?

A. 415 A Street, Northeast.

Q. All right, proceed, please.

A. And the baby was crying. The baby was a little upset for some reason. And Mr. Stewart grabbed the baby and started to the burning furnace with the child. My sister and friends of the family wrestled the baby from Mr. Stewart.

Q. Did Willie Lee Stewart say anything during the time he was threatening to throw the baby in the fire?

A. Well, after the incident had happened we asked him what was wrong with him and why was he doing such crazy things. So he said he hadn't did anything.

Q. Was this immediately after, or was it some time after you asked him these questions?

A. This was shortly after the incident occurred.

Q. He denied having done anything peculiar, is that correct?

A. That is correct.

Q. What else do you recall which was of peculiar or abnormal behavior?

A. Truthfully speaking, there was quite a few incidents that happened.

Mr. Smithson: I would object to that remark and ask that it be stricken; that the witness be responsive to the [fol. 367] question propounded by counsel.

The Court: You are right.

You will have to tell what they were.

By Mr. Carey:

Q. Tell us specifically things that occurred.

A. Well, once Willie was at my home—

Q. Where was your home?

A. My home then was 5404 Foote Street, Northeast.

Q. When was that, Mrs. Whorton, approximately?

A. This was in '50; '51 or '50. I am not so sure. I don't recall the dates.

Q. Now, we are now in the year '50 or '51. We are at 5404 Foote Street, Northwest. Tell us what happened.

A. Willie came to my home. My husband and I were in bed. He came and snatched the covers off me and was getting in the bed with him. My husband had a little difficulty there and a little discussion and he denied all knowledge of doing such things.

Q. Did he suggest any reason for trying to get in the bed with you?

A. No; he did not.

Q. What happened then?

A. Well, my husband asked him to leave, on that occasion, which he did. In fact, he more or less put him

[fol. 368] out. So he denied—he begged his pardon and told him that he didn't do anything wrong.

Q. Did he touch you in any fashion? Did he touch you at all during this time when you were in bed?

A. Well, he was trying. If my husband hadn't been there, I don't know what he would have done to me. But my husband prevented the accusation.

On the next occasion, me and my husband was at home. My son had a little piano or organ.

Q. A what?

A. An organ.

Q. Go ahead.

A. Willie smashed my child's organ through the window. Just picked it up and threw it out. And my husband came in and we got after Willie about it. In fact, he went to Willie's home with him. He carried Willie home on that particular time and Willie denied all knowledge of doing so. We asked him was he going to pay for it. He denied all this.

Q. Was there any argument between your husband and Willie or between you and Willie at the time he threw this organ or piano through the window?

A. No; there was not.

Q. What year was this? Can you estimate it?

A. I think it was '51 or '2, because we only lived there—I don't recall the date. But we moved out between '49 [fol. 369] and '50 and we lived there approximately two years or more.

Q. What else can you recall, if anything, which was of a peculiar behavior by Mr. Stewart?

A. Well, I really, honestly and truly, it was so many things that did occur, but I am trying to think of the main things that I know.

Q. Relax in that witness chair and try and recollect. There is no hurry.

Would it refresh your recollection if I suggested the word "refrigerator"?

A. I didn't understand you, sir.

Q. Would it help your memory if I suggested the word "refrigerator" and "food" to you?

A. That was his refrigerator, yes.

Q. Tell us anything about that refrigerator and food, if you know.

A. Well, this was at 415 A Street, Northeast.

Q. When? Approximately.

A. Approximately '50. Approximately. I am not too sure. I don't recollect the dates. Of course, I had a few difficulties myself in between this time.

Q. Tell us what happened.

A. But I was there and in Mr. and Mrs. Stewart's home. They were living at that time with Willis Daniels in his [fol. 370] home. That was his home there. And Willie had a new refrigerator and I don't think he had completed paying for this refrigerator and Willie went downstairs and busted his refrigerator up. He threw all the food and what-not in the refrigerator out. His wife, which is my sister, and I went to Willie and wanted to know why did he do it and what was the reason for doing this. And there was food there for the children especially, and Willie denied all knowledge of this.

Q. What else, if anything, do you recall about Willie and his peculiar behavior?

A. I am trying very hard.

Q. Take your time.

A. To think of the things that I know that I saw him.

The Court: No. Just think now.

By Mr. Carey:

Q. Think.

(A pause.)

Q. All right, Mrs. Whorton. Having had an opportunity to study your brother-in-law over a period of six or seven years, is it your opinion that Willie Lee Stewart is of sound or unsound mind?

A. Well, that is a great big decision for one to make.

Mr. Smithson: I ask the witness to be responsive.

[fol. 371] A. May I say this:

The Court: You must answer the question.

A. Yes or no. I feel that Mr. Stewart is not of sound mind.

Q. He is not of sound mind in your opinion?

A. In my opinion, yes.

Mr. Carey: Your witness, Mr. Prosecutor.

## Cross-examination.

By Mr. Smithson:

Q. Mrs. Whorton, you had occasion to discuss the alleged soundness or unsoundness of mind of Willie Lee Stewart with your sister since March of 1953, haven't you?

A. Yes; I have.

Q. And you discussed it with a number of other people too, haven't you?

A. Yes; I have.

Q. Especially since March of 1953?

A. I didn't understand you.

Q. Especially since March of 1953?

A. Yes; I have.

Q. Tell me, this occasion when this ice box or this alleged incident about the ice box occurred, you said was in '50 or '51 were you living at 415 A Street then?

A. I don't know. I was not at the time Mr. and Mrs. Stewart were there.

[fol. 372] Q. Were you visiting there that day? Were you visiting there that day?

A. Yes; I was.

Q. And you were present when this occurred with the refrigerator?

A. Yes.

Q. You were in the room?

A. Yes, I was.

Q. And Mrs. Stewart was there?

A. Yes.

Q. And was anyone else there? Anyone else there?

A. I think—I am sure Mrs. Daniels was there and Mrs. Coleman.

Q. And, of course, you heard Willie Lee Stewart tell them that he had told them to keep their food out of his refrigerator, didn't you?

A. I don't recollect that; no.

Q. You don't recollect that?

A. No; I know I did not, sir.

Q. This occasion where the child's piano or organ was destroyed, your husband carried Willie home, is that right?

A. Well, he told me he carried him home. Now, I didn't go with him, yes.



[fol. 373] Q. He left with him? He left your house on Foote Street?

A. Yes.

Q. Carrying him home. He was intoxicated, wasn't he, Willie was?

A. I wouldn't say so, sir. I couldn't answer that yes or no; because I known Mr. Stewart to drink sociably.

Q. Sociably?

A. Yes.

Q. And tell me; I believe you told us that the wife of the defendant is your sister, is that right?

A. That is right.

Q. Tell me, are you the same Betty Whorton who on April 13th 1954 was arrested and convicted of the crime of abortion?

A. Yes; I am.

Mr. Smithson: Your witness.

Redirect-examination. ▀

By Mr. Carey:

Q. Mrs. Whorton, when you used the word "carry," what do you mean by that? For instance, you say your husband carried Willie home. What do you mean by the word "carried"? Did you mean he was drunk?

A. No.

Mr. Smithson: I think counsel's question—

[fol. 374] The Court: You must let her tell what she means.

By Mr. Carey:

Q. What did you mean by the word "carried"?

A. Well, he asked Willie to leave our home. And when Willie refused and Willie told him that he hadn't did anything, there was no reason for him to leave, he said "Well, you are going out of here." And he took Willie by the arms, because Willie was struggling with him and denying all knowledge of doing, in the struggle. After he taken him out, he carried him home. That is what he told me. Now, I don't know.

Q. Somebody drives you home in an automobile, the

expression you use is "He carried me home," is that correct?

Mr. Smithson: I object.

A. That is correct.

Mr. Smithson: To counsel testifying, your Honor.

The Court: Sustained.

Mr. Smithson: I ask that the answer be stricken.

The Court: The answer may go out.

By Mr. Carey:

Q. So the word "carried" to you does not mean drinking or drunk?

Mr. Smithson: Objection.

By Mr. Carey:

Q. It is an expression that you use often?

A. That is right.

[fol. 375] Mr. Smithson: May the Court admonish counsel?

The Court: You mustn't cross-examine your own witness.

Mr. Carey: I think the prosecutor distorted the meaning of the words.

Mr. Smithson: May I ask that those remarks be stricken.

The Court: They will be disregarded.

Anything further?

Mr. Carey: May we approach the bench a moment, please?

The Court: Yes.

(At the bench:)

Mr. Carey: Our timing is bad, your Honor.

Mr. Smithson: I consent, Counsel. I agree with you. I am tired, too.

Mr. Carey: But here is the thing: We have a psychiatrist coming and he has a class from one to two. The strange thing, the only commitment he had for today was teaching one hour. He says he can be here at 2:15. We can start at 2:00. We have a witness we can put on.

Mr. Ackerly: Make it 1:45. We have a stipulation to read.

[fol. 376] Mr. Carey: I guess we can start at 1:45.

Mr. Ackerly: Will the Court recess now, your Honor.

The Court: Yes.

(Counsel returned to trial tables.)

The Court: The jury will please keep in mind the admonition.

Be back promptly at 1:45.

(Thereupon at 12:20 p.m., a recess was taken until 1:45 p.m.)

[fol. 377]

#### AFTERNOON SESSION

##### COLLOQUY BETWEEN COURT AND COUNSEL

(Whereupon the hearing reconvened at 2:00 p.m.)

The Court: Mr. Carey.

Mr. Carey: May we approach the bench?

The Court: Yes.

(Whereupon counsel approached the bench and the following proceedings were held out of the hearing of the jury:)

Mr. Ackerly: I have, your Honor, in my possession the military record of this Defendant, prepared under the seal of the Adjutant General of the Army. I would like to offer that in evidence in its entirety. It gives his complete Army record, so far as it is available, the service record from the beginning to the time he was discharged.

Mr. Smithson: I object, your Honor. I believe that this is properly handled by the stipulation which counsel for the Government entered into with counsel for the Defendant at the first trial in June of 1953.

Actually, your Honor, in that stipulation, I think I went further than I necessarily had to go. There is a lot of material in there which would not be admissible under the Federal Shop Book Rule, because it would not follow the language of *New York v. Taylor*, and the recent *Lyles* case in our own Court of Appeals.

So far as I may have conceded certain features of the matter which is before Your Honor at a previous time, I

[fol. 378] will adhere to that concession, but I will not agree to an expansion of it.

Mr. Ackerly: I will say this.

The Court: What was your stipulation?

Mr. Smithson: The stipulation? I believe counsel has it.

The Court: State it to me.

Mr. Smithson: It is stipulated to the fact that the man had been charged with assault with a dangerous weapon, had been found guilty; it related the nature of the offense; related the fact there had been a recommendation by a social worker that he be restored to active duty, based on previous good service; that he had reenlisted; the psychologist went against the recommendation of the social worker, because he related this—the psychological tests, the Weachley-Bellevue test, and the results.

I think that is as far as that part of the stipulation went.

We had a part of the stipulation of the psychiatrist to the effect that he found no evidence of psychosis or neurosis present in the Defendant.

The full extent of it—I would rather check the record on it, and I believe that copy of my record is with the court reporter.

Mr. Ackerly: I will say this: That Your Honor did [fol. 379] grant us two subpoenas for the doctors involved.

The doctor in California, I could not locate. At least, that was the last-known address that I could get for him, and I had no response from him.

The doctor in New York, I did locate. However, he told me that he had no recollection whatsoever of this man; that the most he could testify to is that he probably signed the psychological evaluation.

After talking with him, I was satisfied that even if I brought him here, I probably couldn't get any more from him than would be in this stipulation.

At the same time, I do feel that there is one recommendation down here at the end, Your Honor, that I would like to get in.

The Court: Well now, the only thing is, Mr. Smithson says there are matters in here that are not proper.

Mr. Ackerly: That is correct. I still proffer the whole record. If Your Honor denies it—

The Court: I can't do that without reading it.

Mr. Ackerly: Well, this is the same record that was before you at the earlier hearing.

The Court: I can't remember that. If you want me to go through there, I would have to do so to determine whether it did meet the requirements of the Shop Book Rule.

Mr. Ackerly: It is record kept in the ordinary course.

[fol. 380] The Court: If your stipulation gets what you want, I don't see why you don't use that.

Mr. Carey: This goes beyond the stipulation.

Mr. Ackerly: There is one statement I feel is highly important. Your Honor might read it. It begins with the word, "Recommendations" in capital letters.

Mr. Smithson: I cannot agree with it, Your Honor. Counsel has shown it to me. The recommendation expresses an opinion based on an alleged psychological examination. If Your Honor will recall, we attacked the basis on which the psychological examination was arrived at in the hearing before Your Honor.

I could not accept that stipulation. Frankly, if counsel does not want to accept the stipulation which was given in the previous matter, then I must say, if Your Honor is asked to review this, that I would have to be heard on every single item which is contained in there and express an opinion.

The Court: I would have to depend upon you to point out to me.

Mr. Smithson: Yes, Your Honor.

Mr. Ackerly: All I am asking the Court to do is to add to what—Mr. Smithson, after all, can only go so far as he feels that he can, as an advocate. I am asking just that one additional paragraph. That is the only thing I am [fol. 381] asking you to consider now. Add that one paragraph to the stipulation.

After all, Your Honor, this being a capital case, I think everything that is of some validity and has some probative value should go into the record.

The Court: If it is properly offered, of course.

Mr. Ackerly: This is the military record of this man. It is dated twelve years ago. And there is no other way to get it in.

Mr. Smithson: Yes. I agree with counsel's statement it is twelve years ago and no other way to get it in; but it

still has to be an exception to the hearsay evidence rule. Here he is asking for a man's recommendation or recollection, in the nature, in other words, of a diagnosis of what he finds. I don't believe that under Lyles or under New York Life a diagnosis is admissible. I frankly, have not ever seen that varied in this Court.

The most recent case is the case of Lyles, Lyles v. The United States, in our own Court of Appeals.

Now, what he asks for under this particular recommendation—I don't find it at the moment—

Mr. Ackerly: On page 3.

Mr. Smithson: Page 3?

Mr. Ackerly: Of the summary at the end.

Mr. Smithson: Thank you, counsel.

[fol. 382] Mr. Ackerly: Near the bottom of that big paragraph.

Mr. Smithson: What he asks for, Your Honor is:

"Recommendations. Restoration — Not recommended."

That is his recommendation or opinion. Certainly, I don't think that should be allowed in in a first degree murder case, when we are going on to the issue of the man's guilt or innocence or responsibility.

"Clemency—Recommend complete remission of the inmate's remaining sentence, with the further provision he be given a blue discharge, because, one, he is feeble-minded; he is a complete illiterate."

I do not accept the conclusion of complete illiteracy by the testimony of my psychiatrist. It is a conclusion arrived at by a psychologist, consisting of his weighing the results of certain tests, which I do not accept, and which Dr. E. V. Williams would not accept when he was examined on it.

Going further, it speaks of:

"Special Fe — Motor repair until the time his case is closed. With his intelligence and learning capacity, he would be practically useless to send him to school for illiterates."



[fol. 383] There is a conclusion I can't accept. Here is a man making \$72.00 a week, by the testimony of his employer, Yancy Peterson, or James Irby—I forget which it is.

Mr. Ackerly: We are in the position where we can only get what we are allowed to have, in effect.

In the stipulation, Mr. Smithson wants this:

"Recommendations: Restoration—yes. According to the previous service record the prisoner has no previous offenses. He served overseas and was honorably discharged and allowed to reenlist. After this experience of a court martial, he perhaps will not repeat the offense."

A recommendation, a conclusion.

"Recommendations made by a Red Cross social worker. Present Adjustment. The prisoner's conduct has been satisfactory so far at this installation."

Conclusion. Exactly the same thing I am asking for.

Mr. Smithson: Counsel, if you don't want the stipulation—

Mr. Ackerly: I appreciate the position I am in. I wish, in the exercise of Your Honor's discretion, that you would direct that we could add just one paragraph. These other recommendations are in the stipulation.

[fol. 384] The Court: I either have to accept your stipulation or rule on your offer; and if I do that, it is going to take the rest of the day. You can see that.

Mr. Ackerly: Well, Mr. Smithson, will you take out these two recommendations, then? I think if one recommendation should go in, then, all or none. Here they are. I was trying to get that in.

Mr. Smithson: You want, beginning on Page 251, beginning with the word, "Recommendations" out?

Do you want this out (indicating)?

Mr. Ackerly: Just this and this, yes. Or let's put that and the other one in, too.

Mr. Smithson: No. I would rather take them both out, if Your Honor so rules.

I think the stipulation ought to be as it was. It was on two trials.

Mr. Ackerly: Let's take the recommendations out. Be reasonable.

Mr. Smithson: If we are going to do other than the stipulation, I think it ought to be in the manner in which His Honor has indicated.

If His Honor asks me, in order to expedite this thing, I would consent to take those out.

I think it ought to be on the basis of the record. Twice the Court of Appeals has said that this man beyond a [fol. 385] shadow of doubt was guilty. Twice they have affirmed the evidence in this case. There has never been any question as to the validity of this stipulation. Therefore, I believe we ought to go with that. That would be my feeling.

Mr. Ackerly: That question hasn't been raised and the Court of Appeals hasn't had the rest of the record before it.

Be reasonable. If you won't put the recommendations in, take the other two out.

Mr. Smithson: Does Your Honor desire that I do this?

The Court: I can't express myself.

Mr. Smithson: I realize that.

The Court: I don't even know what it is.

Mr. Smithson: I will go for that. I will take out the two recommendations. But other than that, I will not go for anything else. If that is not acceptable, counsel, then we will take it item-by-item, because then all bets are off. We will go on that.

Mr. Ackerly: Well, we have no choice but to accept.

Mr. Smithson: I think you do, counsel, because I don't want to be in a position of even appearing that I am hamstringing you.

I believe I conceded far and above more than I ever needed to from the first trial on.

Mr. Carey: In this trial?

[fol. 386] Mr. Smithson: This one and all the trials.

The Court: Gentlemen, I understand, since you have agreed on the stipulation, that this will not be offered. Is that it?

Mr. Smithson: That is this (indicating).

Mr. Ackerly: Very well, Your Honor.

The Court: Then, gentlemen, for the record: Counsel for the Defendant indicate and agree that in view of the stipulation, the record of the Defendant's military service will not be offered.

Mr. Ackerly: Very well, Your Honor.

Your Honor, in a few moments—I am sure that this won't interrupt the trial—would Your Honor indulge me if Mr. Carey went ahead with the trial while I stepped outside? I think our psychiatrist is out there. Mr. Carey will continue.

I will read the stipulation.

Mr. Smithson: Will you read the stipulation?

Mr. Ackerly: Yes.

Is that agreeable?

Mr. Carey: Yes.

Mr. Smithson: From what page will you begin then?

Mr. Ackerly: I will begin on Page 249. And I will state that it has been stipulated, and I am reading from the Army record.

[fol. 387] Mr. Smithson: You are reading from the record of January 12, '55.

Mr. Ackerly: Exactly.

Mr. Smithson: Counsel, when you get to the bottom of Page 252, may I read or see what you read, because my transcript is missing from Page 252 to Page 297.

Mr. Ackerly: Yes.

The Court: At the end of that, use this copy.

Mr. Smithson: Yes, Your Honor.

Mr. Ackerly: All right, Your Honor. I will read that now.

(Whereupon counsel resumed their places at the trial table and the following proceedings were held in open Court:)

The Court: Mr. Ackerly.

Mr. Ackerly: May it please the Court, ladies and gentlemen of the Jury. I am going to read to you portions of the Defendant's military record, which has been supplied to us by the Department of Defense.

These portions of the record have been the subject of a stipulation between counsel, with the approval of the Court.

I am going to read portions of what is known as a Classification Summary.

"Military History. The prisoner's previous—when [fol. 388] I speak of prisoner, it is in regard to the Defendant Willie Leo Stewart—The prisoner's previous service was from 13 January 1943, when he was drafted. He was honorably discharged 13 November 1945 and reenlisted the next day. During his previous service he was twenty months overseas. He was in no actual combat but received a Bronze Star Award.

"His highest grade was private first class. He was reduced once but made it back again. His assignment was with the Air Raid Engineers as a truck driver. He believes that his ratings throughout his previous service were all satisfactory as he was never told of any complaints and had no court martial.

"Previous offenses. The offense was assault with intent to do bodily harm committed 31 March 1946. Trial by court martial 22 May 1946 at Los Angeles, California. Was sentenced to one year with 'D.D.' for the record.

" 'D.D.' means dishonorable discharge."

Mr. Smithson: Objection, counsel. I believe it went [fol. 389] further by the stipulation, and the Dishonorable Discharge was suspended.

The Court: Did you read that from the record?

Mr. Ackerly: Your Honor, I apologize. The word, "suspended" is there. I overlooked it.

The Court: Now, gentlemen, the only way to do is to stick closely to the next.

Mr. Ackerly: That was not intentional.

The Court: If you have comments, that can come later.

Mr. Ackerly: No. This is right from the record that I am reading, that we agreed on at the bench.

Mr. Smithson: That is correct.

The Court: Oh, yes.

Mr. Ackerly: This is right from the record.

" 'D.D.' means dishonorable discharge; suspended.

"The prisoner states that he and several soldiers were gambling and shooting dice. An argument arose between himself and another player about the winnings. \$12.00 was involved. The other soldier and the prisoner were not on good terms.

"The prisoner seemed to have been a little afraid of him, because he knew that he carried a knife.

[fol. 390] "However, in the argument, the other soldier was the aggressor and hit the prisoner. . . "

—Stewart— ". . . with his fist. They fought. The other men separated them. The prisoner left and went to the latrine, where he stayed for some time. When he was about to go up to his room, the other soldier was there, waiting for him.

"The soldier grabbed him and started to reach for his knife. The prisoner. . . "—Stewart—" . . . tripped and there was a scuffle on the floor. The prisoner got his own knife out first but made no direct stab at the other man, but in the fighting on the floor, the other man got cut on his arm and in the back.

"The other soldier was not arrested. The prisoner's witnesses backed out of the trial. So he had no one to tell about what really had happened. The prisoner claimed that he fought in self-defense.

"Paragraph 10: Psychological: This general prisoner has an intelligence quotient of 63 on the verbal subject test . . . "

It says, "subject test." I believe it should be "verbal [fol. 391] sub-test."

Mr. Smithson: I will accept the amendment.

Mr. Ackerly: ". . . verbal sub-test of the Weschley-Bellvue intelligence examination.

"On the performance sub-test his intelligence quotient is 76.

"On the combined scale his intelligence quotient is 65.

"This finding would indicate intelligence falling within the feeble-minded range.

"Reading from Paragraph 11:

"No evidence of neurosis or psychosis is present."



Is this where you said your transcript was missing?  
 Will Your Honor indulge me a moment? This is the  
 portion where Mr. Smithson's transcript is missing.  
 The Court: Yes.

Mr. Ackerly: "Because of his previous good service,  
 because of his mental deficiency, and because of the  
 fact that knife-fighting is not an antisocial act in his  
 society, complete remission of the sentence and blue  
 discharge are recommended. Restoration could not be  
 recommended in this case because of mental deficiency  
 [fol. 392] and illiteracy.

"Diagnosis: Mental deficiency. Primary I. Q. 65,  
 Weschley-Bellevue intelligence examination.

"As a part of his pre-induction examination, there  
 appears on Page 3 of that record, the following quote:

" 'Illiterate but mentally adequate.' "

That was on the pre-induction examination.

Mr. Smithson: I don't believe counsel should explain the  
 stipulation.

The Court: No. Now, just read the text. That is the  
 only way the Jury can distinguish between the text and  
 comments by counsel.

Mr. Ackerly: Your Honor, I was reading it from Mr.  
 Smithson's part of the stipulation that we agreed to. This  
 is the way he explained it.

Mr. Smithson: I don't want that to be argumentative,  
 but the stipulation should stand as to the part of the item  
 we agreed to, Your Honor. Whether or not I stated that or  
 anything else at another time has no part in that stipulation.

Mr. Ackerly: Your Honor can see I was just reading  
 from what I understood the stipulation was.

The Court: Probably a mistaken idea between you and  
 counsel for the Government.

[fol. 393] Mr. Smithson: Up to the point where counsel  
 stopped, before he interpolated, I did so stipulate and do  
 so stipulate.

The Court: Very well.

Mr. Ackerly: That concludes the reading of the stipula-  
 tion, Your Honor.



Whereupon—WILLIE LEE STEWART was called as a witness in his own behalf.

The Clerk: Raise your right hand.

The Marshal: Your right hand.

The Clerk: Do you solemnly swear the testimony you shall give to the Court and Jury in the case now being tried will be the truth, the whole truth and nothing but the truth so help you God? Do you?

The Defendant: I don't know.

Mr. Smithson: May I have the response of the proposed witness?

The Court: Repeat the oath.

The Clerk: Raise your right hand.

Do you solemnly swear the testimony you shall give to the Court and Jury in the case now being tried will be the truth, the whole truth and nothing but the truth, so help you God?

The Defendant: I don't know.

[fol. 394] Mr. Smithson: In view of the response, I don't believe the witness has completed the oath, Your Honor.

Mr. Carey: He responded the best he could.

Mr. Smithson: Counsel's statement is not evidence, Your Honor. He should not be allowed to state it is the best.

Mr. Carey: I merely replied to the prosecutor's statement.

The Court: Proceed with the witness.

Counsel come forward and ask the question.

Mr. Carey: Do you understand what you were asked, Mr. Stewart?

The Defendant: What do you want for me to say?

Mr. Carey: Do you know what an oath is?

The Defendant: I don't know.

Mr. Carey: Have you ever taken an oath?

The Defendant: Not that I knows of.

Mr. Carey: Sit over there.

Mr. Smithson: Does Your Honor feel that the witness is qualified to answer any interrogation in view of his statement he doesn't know what an oath is?

The Court: I suggest you let him proceed without the oath.

Mr. Smithson: All right, Your Honor.

[fol. 395] Direct examination.

By Mr. Carey:

Q. What is your name?

A. Speak a little louder.

Q. What is your name?

A. Stewart.

Q. What is your first name?

A. Willie.

Q. Willie?

A. Yes.

Q. What is your wife's name, Willie?

A. You should ask her that. As far as I am concerned, I don't have no wife. I don't consider I have any; therefore, I can't say what her name is.

Q. Have you ever been married?

A. I wouldn't say married.

Q. What do you mean you wouldn't say married?

A. Well, as far as I concerned, nobody is married, as far as my way of understanding.

Q. Do you have any children?

A. I don't consider—I have none. She say I have some. I don't have none. If she say I have some, I guess I have to leave it to her. As far as my concern, I don't have none and I don't want none.

Q. Do you know where you are now?

[fol. 396] A. Looking at you, as far as I know.

Q. What is my name?

A. I don't know.

Q. Who is your lawyer?

A. Well, I mean, I am my own lawyer, as far as my concern.

Q. Have I been representing you here the last couple days?

A. As far as I am concerned, you all look the same to me.

Q. Do you know what is going on in this courtroom the last couple days?

A. I ain't asked about what is going on. It is up to you go on and describe yourself. I mean, don't ask me. As far as I am just sitting here.

Q. Did you ever hear the name Harry Honigman before?

A. I haven't.

Q. Do you know you are charged with first degree murder?

A. As far as I am concerned, I ain't charged with nothing.

Q. What is first degree murder; do you know?

A. I don't know.

Q. Have you ever talked to me before?

A. I don't recall that.

[fol. 397] Q. Do you know my name is Carey?

A. You asked—you know what your name is. Don't ask me. I ain't asked what your name is; is I? You go ask yourself.

Q. Do you know this gentleman over here?

A. I guess he is just like you—white—all I know.

Q. Is he a lawyer or is he not a lawyer?

A. I don't consider nobody a lawyer. Everybody can be what they want to be. That is up to them. I don't ask them anything.

Q. Do you know where you are now, Mr. Stewart?

A. Looking at you.

Q. Do you know what building you are in?

A. I guess a building. I don't know.

Q. What kind of building is it?

A. You tell it. I don't know.

Q. I am asking you.

A. I am asking you. I don't know. You tell it.

Q. Did you ever shoot a man?

A. Well, I mean, I ain't never shot nobody, but the white folks told me I am supposed to kill. In other words, I consider myself master, as far as the killing situation. I am the monkey and I am the monkey with the tail, and so forth, with that line, and I still remain to see that monkey with the tail.

[fol. 398] I have been told to kill, so my mind tells me to kill, and I am always going to kill until I conquer.

Q. Did you ever kill Harry Honigman?

A. No, I ain't killed nobody yet.

Q. Yet?

A. Yet.

Q. Did you say "yet"?

A. Yet.

Mr. Ackerly: Was that "y-e-t"? I am sorry.

Mr. Carey: Yet, y-e-t.

By Mr. Carey:

Q. Did you ever stand trial before this trial for the murder of Harry Honigman?

A. Well, you talk. You just go ahead and explain yourself. Have you ever stand trial? Go ahead. Don't ask me. I don't know.

Q. Were you ever tried for first degree murder before this time?

A. I ain't never been tried. I ain't never been tried.

Q. Do you know what first degree murder is?

A. Do you know?

Q. I am asking you.

A. I am asking you. I guess you know. You go on and know then. Don't ask me.

[fol. 399] Q. How old are you, Willie?

A. My age stay at all times. I don't get older; don't even get young; stay at one time.

Q. Did you ever talk to any psychiatrists at the District Jail?

A. Psychiatrist? What that is?

Q. Don't you know what a psychiatrist is?

A. You should know. You asking me. Go ahead; don't ask me. I can't help you from asking. What is it? You answer the questions. Don't ask me. Don't ask me. How you expect for me to know. You don't know. All those questions. I don't know the questions what I want to know. You know; go on and answer them.

Q. Willie Lee Stewart, do you ever hear voices?

A. Well, I am going to conquer you and everybody else.

Q. How are you going to conquer me?

A. The good man upstairs say so.

Q. Who is the man upstairs?

A. God.

Q. Have you talked to God?

A. Like I am talking to you.

Q. How many times have you talked to God?

A. Just as many times you talks to me.

Q. What has God told you, if anything?

A. To conquer you and everybody else, all the dark [fol. 400] peoples, white peoples, and everybody. Say none of them no good.

Q. You are going to conquer the world or just America?

A. I am going to conquer the whole world.

Q. Are you going to be the leader?

A. I am going to be the master. I am the master now; and you and nobody else going to stop me.

Q. Are you going to conquer your wife?

A. I got no wife. I don't want no wife. If you want her, go ahead and have her. Don't ask me.

Q. How long have you been hearing these voices?

A. As long as you have, I guess. I don't know.

Q. Do you hear these voices every day or how often?

A. I am my own voice. I mean, you can't change my thoughts and my decisions, so that's that.

Q. What other voices do you hear besides talking to God?

A. Well, why you ask me all these silly questions? I can't make you understand what I understand; you can't make me understand what you understand. What you ask me these questions for?

Q. Have you and I ever talked before?

A. I don't want to talk to you or nobody else. You want to ask me questions; go ahead and answer them; don't ask me.

[fol. 401] Q. Do you hear voices now, Willie?

A. I hear everything. You, too.

Q. Do you like people, Willie?

A. I like nobody. Don't ask me that question no more because I hates everybody.

Q. Do you like me?

A. I don't like you or nobody else.

Q. Am I your friend?

A. Ain't nobody my friend. Please don't ask me that no more.

Q. I am trying to be your friend, Willie.

A. Ain't nobody my friend. I hates everybody. And I appreciate don't ask me that any more.

Q. Do you like this man here?

A. I don't like nobody. I guess he is the same thing you is. You ask him. You like him?

Q. Don't ask me to answer that question.

A. Don't ask me that question no more because I ain't got my mind on you or nobody else. I don't like nobody. I don't even like myself, let alone like nobody else.

Cross-examination.

By Mr. Smithson:

Q. Tell me, Willie, where did you go to school?

A. I guess the same place you went, I guess.

Q. Well, now, Willie, you went to school down in South [fol. 402] Carolina; didn't you?

A. You ask me. I don't know.

Q. Didn't you tell Dr. Klein, on the 26th of March of 1953, you went to school in North Carolina?

A. I ain't told no doctor. I am my own doctor.

Q. Do you remember talking to Dr. Klein?

A. I remember talking to myself.

Q. Do you remember talking to Dr. Klein?

A. I remember talking to myself.

Q. Maybe now, but back in March of 1953, did you talk to Dr. Klein?

A. I don't recall talking to nobody. You or nobody else; and I don't want to talk to you or nobody else.

Q. Did you ever work, Willie?

A. Work?

Q. Yes.

A. I am working now.

Q. Did you ever work in the cotton fields, Willie?

A. How am I going to work? I am the master. Master don't work; do they?

Q. Did you ever tell Dr. Klein you worked in the cotton fields from the time you were ten years old?

A. Have you ever told him that?

Q. Did you ever tell him, Willie?

A. I am asking you. You must have told him. You ask [fol. 403] ing me.

Q. Uh huh.

A. Uh huh. You must have told him. You asking me.

Q. Tell me, Willie, were you in the Army?

A. What army?



Q. United States Army, Willie.

A. What kind of army that is. I am my own army.

Q. Tell me, Willie, do you know Dr. MacAdoo? Do you know her?

A. I done told you once. I answered that. I said, I am my own doctor. So don't try to change my decision, will you, please. I am everything to myself—woman, man, monkey; and I am going to conquer you and everybody else, and you are not going to stop me.

Q. You say we are not going to stop you, is that what you said?

A. You not going to stop me or nobody else.

Q. Willie, did you ever shoot at your wife?

A. I ain't got no wife. Why you keep saying about some wife or something? I told you I don't have no wife. I just got through telling you.

Q. Have you any children, Willie?

A. If you got something, they must be youren. They ain't mine.

Q. Have you any, Willie?

[fol. 404] A. Have you got some?

Q. Did you ever drive a truck, Willie?

A. Well, I don't know about the man having a baby. If a man start having babies, I guess I wish I was the first one.

Q. Did you ever drive a truck, Willie?

A. I ain't never drove nothing yet. I am going to drive.

Q. Willie, did you ever work in cement? Did you ever do any construction work?

A. I don't recall doing anything as far as I know. Why you asking me so many foolish questions.

Q. Where are you living now, Willie?

A. Where I am sitting at, I guess.

Q. Where are you living?

A. Right here.

Q. Where are you living?

A. Right here.

Q. You are staying right there. Tell me, did you just walk over to where you are seated?

A. Huh?

Q. Did you just walk over to where you are seated?

A. I am just sitting here is all I know.

Q. Were you over there earlier today?

A. I was over there, yes.

[fol. 405] Q. You walked over to where you are now?

A. Like you got up, that is like I got up.

Q. So you are not living where you are now; are you?

A. Sure, I am living here.

Q. Where do you sleep at night, Willie?

A. Down to the jail down there.

Q. I see. And how long have you been sleeping there, Willie?

A. Well now, you have to ask them about that. I does not know. I know it is a fire place. I like it very well.

Q. You like it down there?

A. I like it down there.

Q. Tell me, Willie, do you remember when you were arrested?

A. Arrested for what?

Q. For murder.

A. Murder? I ain't murdered nobody yet, but I am, if I ever get the opportunity.

Q. Do you remember when you were arrested for the charge of murder?

A. Don't you worry about that. I take care all of that later on, you and everybody in the whole world. I am going to have my own cross and smiling.

Q. You can see me, can't you, Willie?

A. Sure. You can see me, too, can't you? We see one [fol. 406] another. I am going to be the master and you ain't going to stop me and nobody else.

Q. Tell me, Willie, do you know a Dr. Williams?

A. Dr. Williams?

Q. Yes, E. Y. Williams.

A. Why you keep asking me? If I told you once, I told you a hundred time, I am my own doctor. Why you keep asking me the same question over and over again. I told you I am my own doctor.

Q. Do you know a Deputy Marshal by the name of Ballinger?

A. I am my own marshal. I am everything. That takes care of the whole question. I am everything. Everything you ask me, I am talking to me, I am it.

Q. Willie, you were tried on two other occasions.

A. Well, I don't care how many occasions, how many case — you say case. I was a case man once in a time.

Q. This is the first time you have gone on the stand, isn't it, Willie?

A. What?

Q. This is the first time you have gone on the stand, isn't it, Willie?

A. I am always the stand; I am everything, I done told you.

Mr. Smithson: That is all.

The Witness: You and nobody else going ever stop me.

[fol. 407] The Court: Mr. Carey, anything further?

Mr. Carey: That is all.

The Witness: Ask me.

(Witness excused.)

Mr. Carey: May we approach the bench, Your Honor?

The Court: Yes.

(Whereupon counsel approached the bench and the following proceedings were held out of the hearing of the Jury:)

MOTION FOR MISTRIAL AND TO WITHDRAW A JUROR  
AND DENIAL THEREOF

Mr. Carey: I would like to make a motion for a mistrial and withdraw a Juror on the basis of the prosecutor's remarks to the witness as he was on the stand.

He said: This is the first time you have taken the stand in all your cases, isn't that right, Willie?

I don't think this Jury should be reminded of the fact this is the first time he has taken the stand. What happened in the other trials is no concern of theirs at all. It is highly prejudicial.

The Court: That wasn't mentioned, was it?

Mr. Carey: He mentioned it. Mr. Smithson. Read it. I would like to have you read it.

The Court: The conviction?

Mr. Carey: No, taking the stand. This is the first time you have taken the stand, Willie, isn't it.

Mr. Smithson: I think that is a fact that the Jury is entitled to know, Your Honor. On so many occasions they have [fol. 408] referred to the record in the first case or the second case.

Mr. Carey: I think it is highly prejudicial. I would like to have it read.

Would you read that comment of the prosecutor?

(Whereupon the indicated question was read by the reporter.)

The Court: Motion denied.

Mr. Carey: Off the record.

(Discussion off the record.)

(Whereupon counsel resumed their places at the trial table and the following proceedings were held in open Court.)

The Court: The Jury will please keep in mind the admonition. You will be excused for fifteen minutes.

(Whereupon a short recess was taken.)

[fol. 409] (The Court reconvened at 2:50 p.m.)

The Court: Mr. Ackerly, you may proceed.

Mr. Ackerly: Thank you, Your Honor.

Dr. Williams.

DR. ERNEST YOUNG WILLIAMS, Sworn.

Direct examination.

By Mr. Ackerly:

Q. Will you state your full name, please.

A. Ernest Young Williams.

Q. You are a Doctor of Medicine, sir?

A. Yes, sir.

Q. And you have an office in the District of Columbia?

A. Yes, sir.

Q. And you have other professional connections in the District of Columbia?

A. Yes, sir.

Q. Where are they, sir?

A. At Freedmen's Hospital and Howard University Medical School.

Q. Where did you attend medical school, Doctor?

A. Howard University Medical School.

Q. In what year did you graduate?

A. 1930.

Q. Do you specialize in a particular field of medicine?

A. Yes, sir.

[fol. 410] Mr. Smithson: If counsel is interested, I'll stipulate that the doctor is a qualified physician, and is specializing in the field of psychiatry; that he holds a seat at Howard University in that capacity; that he has qualified on previous occasions as a psychiatrist, and is qualified to express an opinion in the field of psychiatry.

Mr. Ackerly: I appreciate that, Your Honor, but I would like to have the doctor's qualifications stated for the record.

The Court: You may proceed.

Mr. Ackerly: Thank you, Your Honor.

By Mr. Ackerly:

Q. Did you have any training in the field of psychiatry after you graduated from medical school, Doctor?

A. Yes, sir.

Q. Tell us what specialized training you had?

A. I had an externship at Freedmen's Hospital, and I had a Rockefeller Foundation fellowship in neurology and psychiatry for two years, one year at Columbia, and one year at Bellevue. And I had an additional year at Cornell Medical in psychiatry.

Q. Would you keep your voice up a little bit, please, Doctor. I'm having a little difficulty. Do you have a bad throat?

A. Yes, sir. I didn't get the last part of your answer?

[fol. 411] A. I said one year in neurology at Cornell.

Q. At Cornell University?

A. Yes, sir.

Q. Have you had any training or experience at St. Elizabeths Hospital?

A. I did some work there under Dr. Ben Carpman.

Q. Under Dr. Ben Carpman?

A. Yes, sir.

Q. Doctor, since 1930, have you continually practiced in psychiatry?

A. Yes, sir.

Q. What is your position at Howard University at the present time, sir?



A. Professor of Neurology and Psychiatry, and head of the Department of Neurology and Psychiatry at Howard University; Chief Psychiatrist at Freedmen's Hospital and Head of the Psychiatric Service of Freedmen's Hospital in Neurology and Psychiatry.

Q. And in addition to that, do you see private patients occasionally, Doctor?

A. Yes, sir.

Q. And in the course of your practice of the profession of psychiatry, have you had occasion to examine a large number of people?

A. Quite, sir.

[fol. 412] Q. And you do that every day, do you, sir?

A. Yes, sir.

Q. And have you in the past qualified as an expert witness to testify in the field of psychiatry in this Court?

A. Yes, sir; I am a diplomate in neurology and psychiatry. I am a fellow in neurology, and a fellow in psychiatry.

Q. Mr. Ackerly: I submit that the doctor is qualified. Your Honor.

Mr. Smithson: Satisfactory.

The Court: You may proceed.

By Mr. Ackerly:

Q. Dr. Williams, have you ever had occasion to examine the defendant, Willie Lee Stewart?

A. Yes, sir.

Q. Do you recall when you first examined him?

A. Not in terms of dates, but it was about five years ago I first saw him, examined him then, and at that time I was not able to get very much information from him to complete diagnostic study.

Q. Dr. Williams, would it refresh your recollection if I suggested the date of the first trial of this case as June 1953, would that refresh your recollection as to when you might have first examined him?

A. I think so, sir.

Q. Was it your recollection that was the date?

[fol. 413] A. You may be correct; I don't have the date right here at the present time as to when it was.



Mr. Smithson: I will stipulate, counsel, that the trial began, I believe it was the 23rd, approximately the 23rd, and that the doctor saw him on the 21st, at least he saw him on the 21st of June, 1953.

Q. Do you understand that, Doctor, that government counsel is willing to stipulate that you examined him on June 21, 1953?

A. Yes, sir.

Q. Where did you examine him, Doctor?

A. At the District jail.

Q. Doctor, as a result of that examination, were you able to form any conclusions as to the mental competency or as to whether this man was suffering from a mental disease or mental defect at that time?

A. In trying to elicit that history from him—

The Court: You must answer yes or no.

Mr. Ackerly: Answer the question yes or no, and then you may explain.

The Witness: Would you please repeat the question?

Mr. Ackerly: Miss Reporter, would you read back the question, please?

(The reporter read the previous question.)

[fol. 414] The Witness: I couldn't decide either one.

By Mr. Ackerly:

Q. Why couldn't you, Doctor?

A. Because I could not get adequate history from him that I felt was reliable for me to make adequate diagnosis.

Q. Did you from other sources get additional history about this patient, Doctor?

A. I did, but Mr. Wood told me that I couldn't use it.

Q. Yes, sir; from whom did you get this other information?

A. I got some of the information from Mr. Wood; I got some from his wife, and I got some from two other persons.

Q. Mr. Wood was his attorney at that time?

A. Yes, sir; I think.

Q. And he told you that you would not be able to use that other information?

The Court: Now, wait, a minute; he just told you that.

Q. Doctor, having examined this defendant on June 21, 1953, and further assuming that on July 5th, 1946, Captain William D. Aldrich, a psychologist in the United States Army, found, after his examination of this patient, as follows: This general prisoner has intelligence quotient of 63, on the verbal sub-test of the Wechsler-Bellevue intelligence test; on the performance sub-test, his intelligence quotient was 76, and on the combined scale, his intelligence quotient [fol. 415] is 65. This finding would indicate an intelligence falling within the feeble-minded range.

And further assuming, at the same time, that a Doctor Hertz, a psychiatrist with the United States Army, reported in his examination that he found no evidence of neurosis or psychosis to be present, and because of his previous service, and because of his mental deficiency, because of the fact that night fighting is not an anti-social act in his society, complete remission of his sentence and discharge were recommended.

And assuming that this report further stated that restoration could not be recommended in this case because of mental deficiency and illiteracy, and the diagnosis of mental deficiency, prior I.Q. of 65 of the Wechsler-Bellevue intelligence test.

And if you will assume further, Doctor, that while living with his family, several years ago, ~~he~~ without apparent cause, knocked a whole in the ceiling of his apartment with his fist.

Mr. Smithson: I must object to the qualification of counsel "without apparent cause." I'd like to know if counsel is making that from something he is reading, or if he's making it from his own statement.

Mr. Ackerly: That, Your Honor, is from the testimony that has been developed in this courtroom from the witness. [fol. 416] Mr. Smithson: He's characterized it "without apparent cause," Your Honor—

Mr. Ackerly: It was developed in Court.

Mr. Carey: I believe that was the testimony—

Mr. Smithson: May it please the Court. I can answer one counsel, but if both of them are going to chime in—I think I should be heard on this.

The Court: I think the objection is good. Reform your question.

By Mr. Ackerly, continued:

Q. And assuming further that while living with his family several years ago, he knocked a hole in the ceiling with his fist, without any provocation, that the next day he denied knowledge of having done this, and later, he struck and pounded with his fist an electric refrigerator, smashing the door and loosening it from its hinges, and throwing the contents of the refrigerator, the food that was inside, out.

Mr. Smithson: I object to this assumption—that he add the fact that the witness has testified that he told them to keep this food out of his refrigerator. That was the testimony of the witness Coleman from the stand.

Mr. Ackerly: Your Honor, I believe I am entitled to frame a hypothetical question from the evidence in the case. I believe he can cross-examine.

Mr. Smithson: Counsel is correct, Your Honor; but the [fol. 417] hypothetical must include what both sides believe should be included, and yet it may not be a hypothetical based on what he assumes the witness should answer.

The Court: Upon only one subject, it should be as complete as possible. However, you may reform a question on cross-examination, if you care to, including matters omitted.

Mr. Smithson: Does Your Honor desire that before the question is put to the witness to answer that I make such additions as I believe that the evidence would call for, or that I wait until cross-examination?

The Court: I think it is helpful to both counsel if those controversies are made known at the time, so I have no objection to your objections.

Mr. Smithson: Thank you, Your Honor.

By Mr. Ackerly, continued:

Q. Further assuming, Doctor, that the next day, he denied knowledge of having done this act to the refrigerator; that prior thereto he had informed some of the occupants of the house that he did not want them to keep their food in the refrigerator; that, thereafter, on another occasion, he drove his fist through a door in his home, injuring his hand, and

the next day, asked how his hand had been injured, and denied damaging the door.

That on another occasion, he broke dishes in his home, and cut up his new hat and shoes, and later denied knowledge of having done this. Then on another occasion he [fol. 418] threatened to throw one of his children out of the window because it was crying, and on another occasion, threatened to throw another of his small children in a stove that was burning, because it was crying.

And, assuming further, Doctor, that on March 12, 1953, that this defendant, without any mask over his face, without gloves on his hand, walked into a grocery store at approximately nine o'clock in the evening, a grocery store approximately five or six blocks from his home, and then he stood in that grocery store, in the presence of four other people, one a customer who left as he was coming in, the three others, a Mr. and Mrs. Honikman and their daughter, and that the daughter had this defendant in full observation for at least twenty-three minutes of the thirty minute period that he remained in the store, and that during this time, he appeared to be, to the daughter, calm and unexcited. And that he then, thereupon, after drinking a bottle of soda pop and consuming a bag of potato chips, and then ordering and drinking from another bottle of soda pop, turned toward the door, pulled a pistol from his trousers, turned facing Mr. Honikman, and said, in a calm voice, "This is it."

And that the daughter said, "Give him the money," as did the wife. That thereupon, the defendant pulled the trigger and put a bullet through the heart of Mr. Honikman, [fol. 419] walked over to the cash register, scooped the money out of the register, letting some fall to the floor, and that he then turned, and without running, opened the door of the store, closed it behind him and disappeared.

Mr. Smithson: Objection to the form of that question, due to the fact that the witness had stated, that his pace had appreciably quickened, or to that effect, and that the witness had stated that the defendant inquired of her mother to open the cash register, and that the defendant had inquired of her mother to open the cash register, that she had told him to do it herself, because of what he had done, or that he had killed her husband.

Mr. Ackerly: I will accept those additions to the question, Your Honor.

The Court: Very well.

Mr. Ackerly: I think they are fair characterization of the testimony.

Mr. Ackerly: But the question still assumes that he was not running, Your Honor.

Mr. Smithson: I believe that is disputed, so I think it must be taken as a disputed fact.

Mr. Ackerly: I have it right here.

Mr. Carey: Right on this page.

Mr. Smithson: Your Honor, may I ask again that only one counsel be recognized. Otherwise—

[fol. 420] Mr. Carey: Most of this is in the book. Am I denied the opportunity to help my associate?

Mr. Smithson: Your Honor, I believe only one counsel, as I understood your ruling earlier, is engaged in this examination. I believe that that is the approximate way of doing. As I recall the testimony of the witness on cross-examination, she did say his pace quickened—

Mr. Ackerly: Here it is.

(Indicating.)

Mr. Smithson: As I recall the examination of the witness, she did say that his pace had quickened. That was my assumption. However, I do not believe the witness can have the question lessened to the degree that counsel desires.

Mr. Ackerly: Your Honor, I am reading from page 46 of the transcript of proceedings.

Mr. Smithson: The jury is apprised of the facts.

The Court: Read the question.

Mr. Ackerly: (Reading) "By Mr. Carey:

"Question: Did he walk—did he walk fast?

"A. Fast, yes.

"Question: He wasn't running?

"No, he wasn't running."

Now, I accepted Mr. Smithson's amendment that he was walking fast.

The Court: Substitute the word "fast."

Mr. Ackerly: Yes, Your Honor.



[fol. 421] By Mr. Ackerly:

Q. Now, Doctor, assuming the facts that I have just stated to you, can you form an opinion, as to whether or not the defendant, Willie Lee Stewart, was at that time suffering from a mental disease or a mental defect?

Mr. Smithson: Don't answer that question yet, Doctor.

I believe the question is wholly incomplete in these features:

• I would like to add these further facts, if counsel has no objection.

Mr. Ackerly: I do object, Your Honor. I think he has a chance to cross-examine, and that I should be permitted to ask this witness a hypothetical question, and the jury will know whether I have all the material facts.

He can cross-examine.

The Court: Well, a few minutes ago when the suggestion was made you adopted it. Why not here?

Mr. Ackerly: I think we should hear it at the bench.

The Court: Perhaps you want to accept it. What is your proposition?

Mr. Smithson: Assuming further, that on the night of March 12, 1953, that the defendant had been engaged in a card game that day. That he came into the premises of the second floor of 415 A Street, Northeast, where he lived with [fol. 422] his family, and that there were present parties, among them one, James W. Hamilton; that he displayed at that time a 38-caliber Iver-Johnson revolver, which was loaded; showed it to the witness Hamilton.

They asked the defendant to stay there and play cards because he was a good card player.

That there came a time when he put that gun down in the front of his pants; that his pants at that time were blue dungarees; that he zipped up his jacket, which was a blue or gray jacket, I forget the exact description of it, and left the premises; was gone in excess of fifteen minutes to the best estimate of one witness, that is, Hamilton; that he could not say for sure it was fifteen minutes, that was his best approximation. That when he came back, he was dressed differently.

That on the 14th of March, 1953, when the police officers came to his address, that he hid under the bed, that he did



leave the premises; that he was apprehended going into a Lowden Apartment, about a block and a half away, by a captain, now captain of the Homicide Squad.

That he informed the captain, who testified that he trailed him, that he had been in that apartment for a half hour to see a friend of his by the name of Sanders.

That he said later later that he knew that the captain was there at his home, 415 A Street, but that the captain, [fol. 423] he thought, was looking for him to inquire about a friend of his who had gotten into trouble; that he wanted to find out what the captain wanted before he talked to his friend, and that he had left the premises then.

Mr. Ackerly: Objection—

The Court: Will you accept it?

Mr. Ackerly: No, Your Honor, I would not. He restated the testimony—

The Court: Doctor, you answer the original question presented by Mr. Ackerly. Later, the Court will allow additional facts to be included in the question, and then inquiry made as to whether that varies the doctor's opinion.

Mr. Ackerly: I understand that. I'll be glad for him to ask him, but I'd like him to answer my question.

The Court: I have just directed him to do that.

The Witness: The question is—

Mr. Ackerly: Would you read the question, please, the last part of it?

(To the reporter.)

Would you like to have the entire hypothetical question read?

The Witness: I think I got most of it, but I wanted to know what you asked more explicitly.

Mr. Ackerly: Could we have the reporter read that back, Your Honor?

The Court: Yes. I think you can restate that in one [fol. 424] minute.

(As the reporter was searching the record.)

Mr. Ackerly: With the approval of the Court and counsel for the government. I don't want him suggesting that I varied the question.

The Court: No, go ahead. You have the Court's authority.

By Mr. Ackerly:

Q. Doctor, assuming the facts that I gave you, with the additions that you heard Mr. Smithson state earlier that I said I would accept, ~~can you form~~ an opinion as to whether the defendant, Willie Lee Stewart, was on the night of March 12th, 1953, suffering from a mental disease or mental defect?

A. Or—you said?

Q. Yes.

A. I would say both; I don't know whether I can say both or not—you said "or."

Q. Yes.

A. You said "or."

Q. Your answer is both, Doctor?

A. Yes. You asked whether it was one or the other; I'd say both. I don't know whether I'm permitted to say that or not.

The Court: The question includes mental disease and mental defect.

The Witness: I'd say both, sir.

[fol. 425] By Mr. Ackerly:

Q. The answer is both?

A. Yes, sir.

Q. Now, Dr. Williams, if you added to the question that I stated to you, the additional statements that Mr. Smithson just wanted to add on to the question, would that change your conclusion in any way, Doctor?

A. He said so many things. I was just listening to them as he went.

The Court: The appropriate way is on cross-examination for Mr. Smithson to ask the doctor to include, with the statement made by Mr. Ackerly, certain other matters further.

Mr. Smithson: Your Honor, since the defense counsel would not accept the amendments to the hypothetical, I'm willing to take care of the matter on my cross-examination.

The Court: Very well.

Mr. Ackerly: Your Honor will not permit me to ask that question?

The Court: That is not your request.

Mr. Ackerly: Very well.

By Mr. Ackerly:

Q. Doctor, what is your diagnosis, or what mental disease or mental defect do you find from the facts that I have stated to you?

A. In the first place, in the first part you gave, would suggest that this man has a level of mental defect, mental [fol. 426] deficiency, that would characterize him as a moron.

Q. Moron?

A. Yes, sir.

Q. Doctor, is an I.Q. of 65 on the Wechsler-Bellevue intelligence scale within the moronic range?

A. Yes, sir.

Q. Would you state to the Court and the jury, Doctor, the ranges which are generally accepted for the Wechsler-Bellevue intelligence examination, if you can?

A. Basically, we look upon an individual who has an I.Q. from zero to 25 as an idiot, and with a mental age of one to three years of age.

We consider an individual as being an imbecile if he has an I.Q. from 25 to 49, and the mental age from three to seven years of age.

And from 50 to 70, as being a moron, and a mental age from seven to ten and a half.

Q. Doctor, do you know what percentage of the population have an I.Q. on the Wechsler-Bellevue scale of 65 or below?

A. No, sir; I don't know those figures. But I don't suppose there's any more—

Mr. Smithson: Objection to the supposition.

The Court: If you don't know, you must say that, just say you don't know.

[fol. 427] Q. An I.Q. above 70 then, Doctor, is out of the feeble-minded or moronic range, is that correct?

A. Yes, from 70 to 80 is what we call a dull normal.

Q. Now, Doctor, what diagnosis did you arrive at as far as the mental disease is concerned?

A. From the symptomatology given to me and suggested, I thought this man had a manic-depressive psychosis.

The Court: Wait a minute. On the facts of the case, of the question, that's what you want, isn't it?

Mr. Ackerly: That's what I asked him.

The Court: Just based on the facts mentioned in the hypothetical question.

The Witness: I don't know whether it—

Mr. Ackerly: Based on the examination and the facts, Your Honor.

The Witness: On the basis of the question that you gave, proposed to me, I would say that the findings suggest a manic-depressive psychosis in the manic phase.

By Mr. Ackerly:

Q. Could you explain to the Court and jury the meaning of the term "manic-depressive psychosis," Doctor?

A. A manic-depressive psychosis is a psychotic description given in which an individual shows varying changes; varying changes, from a typical manic picture to one of depression.

[fol. 428] For this reason, it is sometimes called cyclic insanity, meaning it goes by a cycle. But in between, there are varying patterns that one may get. You may get manic, normal, depression, normal, manic, or you may get two manics, then a depression.

I could put them on the board and show you. There are varying patterns of this picture.

Mr. Ackerly: Your Honor, would you permit the doctor to use the blackboard to illustrate the cyclic nature of this psychosis?

The Court: If that is what you would to do, Doctor, go over to the blackboard.

(The witness left the witness stand, and went to the blackboard.)

The Court: Gentlemen of the jury, just be at ease. When you're ready, I'll be back.

(Whereupon, the Court left the courtroom, and returned in a few minutes, after the witness had completed his diagram.)

Mr. Ackerly: Your Honor, may the doctor be permitted to come over to the board and explain the diagram he has put on the board?

The Court: Yes. You may proceed.

(The witness left the witness stand, went to the black- [fol. 429] board, indicated his diagram to the jury, with the following explanation:)

The Witness: These illustrations, beginning with this as a base line, and this as another base line, and we consider this base line as being normal.

In manic-depressive psychosis, we have various manifestations: First of all, it may begin with what we call a manic pattern, where the patient becomes restless, boisterous, aggressive, cruel, dominating, and, at times, uncontrollable in his behavior.

His sexual passions at that time are usually excessive.

And we consider this problem, this part, as being more psycho-motor activity, constant motion. Even in speech, the speech seems to be pushing out, constantly pushing out, talking, talking.

We come to the manic phase. We don't know why, this goes on for a time, and then the individual goes into what we call a depressive phase, goes over the base line. They become exceedingly depressed. Then this depression lasts for a certain period of time—it is unpredictable—and then he goes into a normal stage, and this individual may go along for a period of time, maybe weeks, months or years, at a normal level. That is one pattern you may get.

Or, you may get a second one, where it starts with a slight [fol. 430] depression, goes on straight on up in a manic phase, drops back into a depressive phase, goes back into a manic phase again, and then tapers off.

Or, it may start with severe depression, such severe depression that the patient won't eat, he doesn't drink, won't address himself, stays in a semi-stuporous state for a considerable length of time, and then, for some unexplainable reason, he becomes extremely violent, and has to be controlled or shackled, and then after that goes out, he goes into a normal phase.

We can't explain why these changes take place.

Or, you may get another phase, in which you get manic and then normal, and then another period of mania, and

then he goes into a depression, then normal, then again, manic, then normal; and that may be the end of that cycle.

Then, you may have one to two periods of normal, mania, rather; ordered by one period of normal and then another period of mania, then another period of depression—I beg your pardon—then another period of normalcy.

Or, you may start over here, with depression, normal period, a period of mania, normal period, then mania, then another normal period.

This is a complete cycle of insanity, which sometimes lasts from weeks to sometimes years.

[fol. 431] (The witness resumed the witness stand.)

By Mr. Ackerly:

Q. Doctor, I believe you stated that sometimes these periods of normalcy that you have shown in the diagram last for varying lengths of times, from months to years, is that correct?

A. Not during the cycle. After the cycle is over. They may have a period of normalcy that may last for months or years but not during the cycle.

Q. Yes. Now, Doctor, during the period of mania and the period of depression, are there symptoms which are generally readily ascertainable by qualified psychiatrists of this disease?

A. Would you mind repeating the question. I don't completely understand.

Q. During periods of the manic stage and the depressive stage, are there symptoms which are generally accepted by qualified psychiatrists, which can be ascertained from the patient to indicate the presence of this mental disease?

A. Yes, sir.

Q. During these periods of normalcy, as you have shown them here in these diagrams, are these symptoms still present?

A. Yes, sir.

Q. In every case?

A. Yes.

Q. Are there periods of normalcy, Doctor, when it would [fol. 432] be difficult or even impossible to even ascertain the symptoms of this disease?



A. Yes, sir. I'd like to qualify what I mean by normalcy. Normalcy is in the sense that the individual isn't sick, not that the individual isn't sick, but, at that period, most of the aggressive symptoms that you would expect, are not present, and the depressive symptoms are not present either, and that's why we call it that state of normalcy. It's almost what you might call a transitional state, that the hypermanic reaction, that is, constant motion, trying to hurt somebody, isn't present; this depressive feeling, and so on, is not present.

Now, we call it more or less a quiescent stage. I use the word "normalcy," because it is normal as compared to the manic, and normal as compared to the depressive stage, but it comes in between these two periods.

Q. Then, would it be possible, Doctor, if you examined the patient in one of these states of normalcy, that you would not find symptoms of manic-depressive psychosis?

A. That's where the trick comes.

Q. Would you explain that, Doctor?

A. I say, that's where the trick comes. The trick comes when the doctor or psychiatrist who examines the patient at that time must have complete records or information as to what transpired before. If you don't get what transpired before, you probably will be completely fooled, in the present [fol. 433] station that this patient is completely normal, because he doesn't show anything or he doesn't say anything. You must have the awareness of what went on before to know what's going on. In other words, if you catch a patient before he starts going up, and you want to know—if you catch him after he's going, you won't know. If you catch him after he's going up, you won't know.

If you catch him after the depression, you won't know. But if you catch him at this particular period, you're liable to come up with the feeling that, well, here's a man that seemingly looks all right to me, but that all right feeling is only based on the fact that the man is calm at that time. Constant—you know, rumblings, if you want to call it——

(Indicating)

Q. In your general day to day practice at Freedmen's Hospital, Doctor, and your private practice, do you usually accept only the facts given you by the patient in making your diagnosis?

A. No, sir; you couldn't.

Q. Doctor, when a person is in the manic-stage, the later stage of this cycle, and they leave the manic stage, do they usually have a clear recollection as to what happened and what they did when they were in that manic stage?

A. No, sir.

Q. They do not, Doctor?

A. No, sir.

[fol. 434] Q. Is that true in every case?

A. I wouldn't say in every case. You have them individualized, but for the most part, they have no recollection of what goes on, when they come back. I'll put it this way: When they come back to a normal state, they have no recollection of these many things that they did during these interims at all.

Q. Is it unusual, Doctor, for a person in a manic stage to commit anti-social and even unlawful acts?

A. Very much so.

Q. I said is it unusual? Do you understand that?

A. It is unusual—

Q. It is unusual for a person in the manic stage to commit anti-social or unlawful acts?

A. I said yes.

Q. It is unusual?

A. Wait a minute. Is it unusual, or is it usual?

Q. Yes. Well, would you tell us, is it usual or unusual. For example—

A. Usual.

Q. It is usual?

A. That's right.

Q. Would you like some water, Doctor, are you having trouble with your throat?

A. I have some here. Thank you.

[fol. 435] Q. And this manic-depressive psychosis is a mental disease, is that correct, Doctor?

A. Yes.

Q. Is it characteristic of a person—is it characteristic of a moron to commit anti-social acts?

A. Yes, sir.

Q. Doctor, you have, since your first examination of this defendant, examined him on other occasions, have you not?

A. Yes, sir.

Q. And did you observe him testify in this courtroom here this afternoon, Doctor?

A. Yes, sir.

Q. From your observation of his testimony on the witness stand this afternoon, with the other examinations that you have conducted—

Mr. Smithson: Before you finish that question, we'd better approach the bench. I think I want to be heard on it.

The Court: I want to see the Marshal.

(The Marshal approached the bench and conferred with the Court.)

The Court: Come to the bench.

[fol. 436]

AT THE BENCH:

Mr. Smithson: Two questions I'd like to know: If counsel realizes that this little act or whatever it was that the defendant put on today was viewed by the person in the courtroom—

Mr. Ackerly: He's an expert.

Mr. Carey: He isn't subject—

The Court: All witnesses were excluded. He had no right to be here.

Mr. Carey: The question of the witness—my understanding is they give professionals the right. He is not excluded if he's here for the specific purpose of testifying as to his general behavior—it's part of our general defense, our defense of insanity. I say there was no impropriety.

The Court: You asked that all witnesses be excluded, and they were. That is what I just asked the Marshal.

Mr. Smithson: May I say further, Your Honor, that what counsel now proposes to establish is mental competency. I may be wrong—before you finish—that determination was made prior to trial—to use counsel's own words, the rule of the case.

Mr. Ackerly: I didn't intend to go beyond that. I was simply going to ask him whether his further examination and his study of him on the witness stand would cause him to change his conclusion that he has already given on the man's mental capacity, in 1953, I wasn't going to—

[fol. 437] Mr. Smithson: He's raising the very issue by his

saying his "observation" of the man. He's saying indirectly is this man competent to stand trial—

Mr. Ackerly: Your Honor, I have seen a number of cases in which psychiatrists have been allowed to remain in the courtroom.

The Court: The thing that bothers me is that he was excluded from the courtroom.

Mr. Carey: He wasn't here originally.

The Court: He was here this afternoon.

Mr. Ackerly: He didn't get here until 2:30, Your Honor, or 2:15.

Mr. Smithson: Counsel should have checked, or should have asked permission.

The Court: The fact is that he heard the testimony. He says he heard the testimony.

Mr. Ackerly: Yes, he does.

Mr. Carey: I thought that rule didn't apply to professional witnesses.

The Court: It applies to all witnesses. That was the request, and that was the order.

Mr. Ackerly: I will withdraw the question. We did know. I deny that we were not complying with the rules. I have seen a number of times when a psychiatrist has been present [Col. 438] to examine a man.

The Court: Not in my Court. Occasionally, in my Court they have asked that character witnesses be allowed to remain. I have permitted that.

Mr. Ackerly: Well, this couldn't influence his testimony at all, except, Your Honor, who else could we get—

The Court: I don't think that any harm has been done, unless—if you make that a part of your examination—what he saw and heard here.

Mr. Ackerly: I beg pardon?

The Court: He expressed opinions on what he saw and heard here.

Mr. Carey: In the Alger Hiss case, United States versus Alger Hiss, during the time that Whittaker Chambers, the government's main witness, was testifying, he testified for several days, the defendants had psychiatrists on hand to study Chambers' testimony, his direct and cross-examination, and I was convinced that professional witnesses were excluded from that general exclusion of witnesses from the courtroom.

Mr. Smithson: In that particular case they had the permission of the Judge to do that, and in addition to that, the witness was not on trial; it was the defendant. And that was the only time they could have the psychiatrists to observe his demeanor.

I will agree with counsel that it was done in the Hiss case. [fol. 439] The rule in this Court, as far as I remember—

The Court: Mr. Ackerly suggests that we proceed without further reference to the fact that he was in and heard the testimony.

Mr. Ackerly: I'm sorry. I thought Your Honor would rule that I couldn't use that part of that question. I would prefer not to have to withdraw it. I would rather—

The Court: I didn't say withdraw it; that you are not to proceed with it any further.

Mr. Carey: In other words, it's improper?

The Court: Go right ahead as if nothing had happened, but don't bring that up again.

(Counsel having returned to trial tables:)

By Mr. Ackerly:

Q. Now, Doctor, the examinations subsequent to the one on June 21, 1953, and there have been on more than one occasion that you examined the defendant, is that not correct?

A. Yes, sir.

Q. Did the result of those examinations in any way change your opinion that the defendant was suffering from a manic-depressive psychosis?

A. I didn't get the question.

Q. You have examined the defendant on several occasions since that occasion of June 21, 1953, is that correct?

A. Yes,

[fol. 440] Q. Have the results of those subsequent examinations in any way changed your conclusion that the defendant on March 12, 1953, was suffering from a manic-depressive psychosis?

A. No, sir; I haven't found anything so far to change that.

Mr. Smithson: I didn't get the witness's reply. Could I have it read.

The Court: Read the answer.

(The reporter read the previous answer.)

Q. Doctor, is a manic-depressive psychosis a condition which is subject to increasing or decreasing, capable of improvement or deterioration?

A. Is it capable of improving—

Q. Is this a disease in which the patient is capable of improving or deteriorating?

A. It does both.

Q. Yes, sir. In your opinion, is manic-depressive psychosis a permanent mental disease?

A. I'd like probably to get the word "permanent" defined for me, so I wouldn't be saying the wrong thing.

Q. Well, I'd like—

A. You asked the question, sir; I would like for you to define just what you mean by what you asked me; I may answer the wrong thing and give the wrong answer. Would [fol. 441] you define to me what you mean by "permanent?"

Q. Yes, I will try to make it as clear and simple—I want to get the whole thing as clear and simple as I can for the jury, Doctor? Is this manic-depressive psychosis usually a temporary condition, or does this cycle phase continue in one form or another as a permanent condition?

A. No, it is not a permanent condition. It has limitations. It goes on, and then it stops, and it goes on, and then it stops. It is not curable, if that is what you mean.

Q. Not curable? Not incurable?

A. It's not curable. That's right.

Q. It's not curable.

A. It has periods in which the patient will recover, but the disease process will eventually recur.

Q. Is this a hereditary disease, Doctor?

A. Yes, a good per cent, about thirty-two percent is considered as hereditary background. In about thirty-two per cent of cases.

Q. Doctor, a few months ago, I asked you whether it was likely that a person in the manic phase would commit anti-social acts. I'd like to expand that to go beyond anti-social, and ask you whether a person in the manic phase would be likely to commit acts of violence, acts of crime, acts of passion?

A. Well, I consider all those anti-social. My interpretation of anti-social would include all those things that you [fol. 442] mentioned.

Q. And that includes illegal acts, violations of the law?



A. All those are anti-social as far as I'm concerned.

Q. And yet when the person leaves the manic phase, he would likely have no clear recollection of the——

A. Doesn't appear to.

Mr. Smithson: I believe counsel is testifying a bit to that, and I believe the witness has already stated that once—objection, Your Honor.

The Court: Has this been stated to the witness?

Mr. Ackerly: I think it has; I'm trying to make it as clear as possible for the jury.

The Court: No use to repeat it then.

Mr. Ackerly: Would Your Honor indulge me a moment?

The Court: Yes, of course.

By. Mr. Ackerly:

Q. Doctor, this mental defect, that you found to exist as a result of the intelligence quotient of 65 on the Wechsler-Bellevue intelligence test, is that a condition which is capable of being cured?

A. No, sir.

Q. Is that a permanent condition?

A. Yes, sir.

Mr. Ackerly: You may cross-examine.

[fol. 443] Cross-examination.

By Mr. Smithson:

Q. Tell me, sir, do you mean that all morons have a mental defect?

A. Yes, sir.

Q. And, therefore, if a person had a, shall we say, Wechsler-Bellevue rating of 69, that, therefore, he had a mental defect, is that it?

A. I wonder if you would repeat the question, please, sir.

Q. If a person had a mental rating or intelligence rating of 69 on the Wechsler-Bellevue test, 69—that makes him a moron—and, therefore, he's never capable of improving, is that correct?

A. Yes, sir.

Q. Well, tell me, sir, he knows right from wrong, does he not?

A. Well, you could find patients at St. Elizabeths who know right from wrong. That doesn't prove anything.

Q. Doesn't prove anything that a man knows right from wrong?

A. No. You find psychotic patients who know right from wrong.

Q. All right, sir. And, knowing right from wrong, he would be able to embrace the right and reject the wrong, is that—

A. He doesn't have the capacity—

[fol. 444] Mr. Ackerly: I object, Your Honor. That's no longer the test. I didn't even go into it. I went into the test as laid down by our Court of Appeals.

Mr. Smithson: May it please the Court, May I—

The Court: Objection is overruled. You may proceed.

By Mr. Smithson:

Q. Now, sir, do you mean that anyone that you might rate below 70, which, I believe you say, is the lowest norm on the intelligence scale, that such a person isn't responsible for his acts?

A. I wouldn't like to say I do, because I didn't do it. This is a scale prepared by experts all over the world and accepted by them. You shouldn't say my scale—I don't have any.

Q. I'm not arguing with you, Doctor; I'm speaking from your testimony here today; you have so stated, that such a person is a moron and not responsible, is that correct?

A. Yes, sir.

Q. I see. Now, a lot of people who went into military service had no formal education, isn't that correct?

A. Yes, sir.

Q. They were what we would call completely illiterate, isn't that correct?

A. Yes, sir.

[fol. 445] Q. In fact, they wouldn't even do as well as 76 on a performance scale, isn't that correct?

A. No, sir; that's wrong.

Q. Therefore, you would lump all the people who were illiterate who went into the service, and you would say that they would have achieved better than a 76 performance rating on a Wechsler-Bellevue, is that your testimony?

A. No, sir. I would like to say this: That I was one of the individuals who examined many people at Fort Myer who went into the Army, and we accepted many at the last moment, who had very, very low intelligence; accepted many men who couldn't read or write. What the Army did was, the Army took those men and gave them a three months' course, and in the course of that three months' course, those that performed up to a certain level were accepted; those that performed at the level between 60 and 70 were also accepted in the last few months of the war because of the shortage of manpower. But it had very little to do with the problem of intelligence, just a matter that they had to get an Army of fifteen million men, and we were advised to take every man. So that doesn't prove anything.

Q. I believe you say the last few months of the war, sir?

A. Yes, sir.

Q. Do you know that this defendant went into the service [fol. 446] in 1942?

A. 1942?

Q. Yes, sir.

A. He probably could have gone in in 1942, depends on the area. In some areas——

Q. The area——

A. If you'll just let me finish, sir. In some areas of the country where the intelligence was very, very low, we found that they took men with surprisingly low intelligence; in an area like Washington you wouldn't consider at all. We found men in the Army from South Carolina, Georgia, and many southern states, that had a very, very low I.Q. that were accepted in the Army that wouldn't have been accepted any place else, sir. That's a fact.

Q. Now, Doctor——

A. I'm sorry.

Q. I didn't mean to interrupt you. Now, you mentioned South Carolina. Why did you mention South Carolina then?

A. Because, sir, if you look up the status given each year, the amount spent on education, you'll find it's one of the lowest in the United States.

Q. Yes. There are a good many other states in the southern area that haven't spent the same amount, shall we say, that we have spent up in the District?

[fol. 447] Mr. Ackerly: Your Honor, objection——  
The Court: Sustained.

By Mr. Smithson:

Q. Now, tell me, Doctor, you don't know where the defendant went into the service, whether it was from the District or from South Carolina, isn't that correct?

A. That's right.

Q. Now, this manic psychosis that you talked about, you said that you found the defendant in a manic phase, is that correct?

A. Yes, sir.

Q. Isn't it a fact, Doctor, that you found no such thing after a two hour examination?

A. That's a confusing question, sir, and to answer your question, it confuses me, and probably confuses everybody else.

Mr. Ackerly: You asked him after a two-hour examination—

Mr. Smithson: In that regard, Your Honor, he can either answer it or not.

The Court: The amount may go out.

The Witness: Would you mind giving me that question again? Would you repeat it, please.

The Court: Mr. Smithson, how long will your examination run?

Mr. Smithson: It may be awhile, Your Honor.

[fol. 448-451] The Court: That will be all for today.

I will ask the jury to keep in mind the admonition, and to be back promptly at nine forty-five. Doctor, you be back, too.

(Accordingly, at 4:00 p.m., the Court adjourned until 10:00 o'clock, November 20, 1958.)

[fol. 452] The Marshal: Doctor Williams, resume the stand. You have already been sworn.

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Dr. ERNEST YOUNG WILLIAMS, the witness on the stand at adjournment, resumed the stand and further testified as follows:

The Court: Mr. Smithson, you may resume your cross-examination.

Mr. Smithson: Yes, Your Honor.

By Mr. Smithson: 4

Q. Doctor, when you examined the defendant for the first time, you examined on the 21st of June of 1953, isn't that correct?

A. I am not sure, sir, of the exact time but you may be correct.

[fol. 453] Q. You don't recall what time it was?

A. No, sir; not right now.

Q. Well, sir, did you know that at that time the defendant, at the time you examined him, was being tried in a trial beginning on the 19th of June 1953?

A. Those dates at the present time, sir, don't help me very much.

Q. I see. He didn't tell you, then, that he actually had been in court on that trial when you came to see him for your examination?

A. No, sir.

Q. Well, now, tell me, Doctor: Of course, the things which a person may be undergoing by way of, shall we say, trial for murder, will affect what response you get from him, isn't that true?

A. Yes.

Q. And he will want to do the best he can for himself, isn't that true?

A. If he can.

Q. Yes; if he can, sir?

A. That is right.

Q. And on the first occasion, sir, you received from him his name, didn't you, his address, where he lived?

A. That is right.

Q. And that he was married and had children?

[fol. 454] A. No; I didn't get that.

Q. You say you didn't get that?

A. I got that he was married.

Q. And that he had children?

A. No; not the children.

Q. Now, Doctor—Oh, you said that you were a follower, or you had studied under Doctor Karpman, is that correct?

A. Quite so, sir.

Q. Doctor Ben Karpman?

A. That is right.

Q. Do you know as a fact Doctor Karpman is one of those psychiatrists—

Mr. Carey: Just a moment. That has nothing to do with this particular case, whom he studied under.

Mr. Smithson: He brought it out.

The Court: Matter of qualification.

Mr. Carey: Just like he is a graduate of Howard University. Would you be able to go in the quality of medical personnel at Howard University? I don't see the fact he studied under Doctor Karpman has anything to do with this man's ability. I don't follow it at all.

The Court: Objection overruled.

By Mr. Smithson:

Q. That is correct; you did so state to us yesterday that [fol. 455] you were a follower or studied under Karpman?

A. Not a follower but studied under him.

Q. I don't mean to put words in your mouth. Your best recollection of how you described it, sir?

A. I said I studied under him.

Q. Do you know, and don't you know as a fact, Doctor Karpman is one of those psychiatrists that subscribes to the view that every time a person commits a crime that that person is suffering under some mental disorder?

A. Doctor Karpman has never so expressed that to me in my studies with him.

Q. Tell me, sir, do you subscribe to that view?

A. No, sir. I have, each case that I see, I study and come to my own opinion.

Q. But you have testified in this court, have you not, Doctor?

A. Yes, sir.

Q. Have you not so testified that you have never examined a person in a criminal case and found that person of sound mind?

A. No, sir; I don't remember saying that to you or anybody in the United States. I have examined too many people, sir, that I have never testified in court about because I find no evidence at that time for me to come into court about them. There are numerous cases I have seen that I [fol. 456] have never been to court with because there was no basis for me to come to court with them.

Mr. Smithson: Your Honor, at this time, for the record, the Government would designate and mark for identification, a page 80 of a transcript. Would Your Honor care to



have this identified at the bench, in case there would be any objection?

Mr. Ackerly: No; I know what is in that transcript. I think we should come to the bench. I think this is highly improper.

(At the bench:)

Mr. Smithson: Your Honor, what I propose to mark and have read into the transcript, and therefore I will read it now and make my proffer as to its admissibility. It begins "In the Case Percy T. Thomas, Jr., Appellant v. United State of America, Appellee, No. 14266. Appealed from the United States District Court for the District of Columbia." Robert I. Field, Printer. It is page 80 of a transcript of the trial of the named defendant Thomas. The examination is, the cross-examination of Mr. McLaughlin of our staff. And the witness under examination is Dr. E. Y. Williams, the present witness on the stand.

The examination and the pertinent part which the Government offers for the purpose of going to the credibility of this witness, and do offer it for the jury to weigh in that [fol. 457] regard:

"Question: Doctor, you have testified that you have appeared here and testified as an expert in these courts many times?

"Answer: Yes, sir.

"Question: In any of those times did you ever testify that a person was of sound mind?

"Answer: Yes, sir.

"Question: How many?

"Answer: I can't recall.

"Question: Name them in a criminal case, Doctor.

"Answer: I don't recall any in a criminal case."

I proffer that, Your Honor, because I believe it is admissible to show that the doctor's testimony, that he has in the past always so testified that all criminals, that he has examined, have been of unsound mind.

The Court: As I understood the testimony, the doctor testified that he examined him.

Mr. Smithson: That is correct, Your Honor.

The Court: And didn't find occasion to come to court.

And leaving the inference that he was only brought to court in cases where he found—

Mr. Ackerly: Exactly, Your Honor. That is exactly right.

Mr. Smithson: That, of course, would be his explanation, [fol. 458] Your Honor. But, Your Honor, you go on to the further extent: He at one time testified, about two weeks ago before Your Honor, oh, yes, he had testified that a person, for the Government in fact, but he also found that person of unsound mind:

Mr. Ackerly: That is not true.

Mr. Smithson: I will show it in the transcript.

Mr. Ackerly: I will ask him about it right now, on the witness stand.

The Court: Wait a minute, gentlemen. We are getting away from the proffer. Let's stick to that. I think I will deny it.

Mr. Smithson: You won't let me go into that?

Mr. Ackerly: Your Honor, at the same time, we would like—

#### MOTION FOR MISTRIAL AND WITHDRAWAL OF A JUROR AND DENIAL THEREOF

Mr. Carey: I'd like to make a motion for a mistrial and withdrawal of a juror on the basis of the prosecutor's question. Once he says to this man, "Did you study under Doctor Karpman?" and he says yes, he said is it not true that Doctor Karpman's philosophy of psychiatry is to the effect that any man who violates the law is ipso facto, per se, of unsound mind. We say it doesn't follow. For instance, I may be a Catholic who goes to the Presbyterian College or I may be a Presbyterian who goes to a Catholic college. The fact I study under certain professors, says ipso facto [fol. 459] I subscribe to the philosophies of the school. So I think this is not a proper extension of the fact. I think it is totally inflammable.

Mr. Ackerly: Your Honor, there is no evidence anywhere in this record whatsoever that that is Doctor Karpman's philosophy.

The Court: Motion denied.

Gentlemen, I want to go into my chambers, so be at ease for a few minutes.

(Counsel returned to trial tables.)

The Court: The jury will be at ease for a few minutes. Just remain in the box until I come back.

The Marshal: The Honorable Court stands recessed until return of Court.

(Thereupon, at 10:18 a.m., a recess was taken until 10:28 a.m.)

#### AFTER RECESS

The Court: Mr. Smithson, you may proceed.

By Mr. Smithson:

Q. Doctor, during the two hours that you saw the defendant on June 21st of 1953, you arrived at no conclusion, isn't that correct, as to his sanity?

A. No, sir; that is not so.

Q. Didn't you testify to that, sir, previously?

A. Not exactly the way you put it.

Q. Did you, sir, not testify that for two hours you examined him and could come to no conclusion as to any [fol. 460] mental condition of that defendant?

A. No, sir; not that way.

Q. All right, sir. Now, you have said that you find the man a manic depressive, is that right?

A. Yes, sir.

Q. You have testified yesterday that you have seen nothing to change your opinion although you have seen him since then, is that right?

A. Yes, sir.

Q. But did you not testify very recently to the effect that the man was a schizoid affective personality?

A. Yes, sir.

Q. There is a difference there, is there not?

A. Yes, sir.

Q. So you are not accurate when you say that you have never changed your diagnosis, isn't that correct?

A. From the way you put it, sir, it would give the jury and the Court a misconception.

Mr. Smithson: May—

The Court: You must answer Mr. Smithson.

(The question was read by the reporter.)

A. No, sir; it is not correct.

Q. Then, sir, you are saying that manic depressive is the same as schizo-affective?

[fol. 461] Mr. Ackerly: Objection.

Mr. Smithson: This is cross-examination, Your Honor.

The Court: Objection overruled.

Proceed. You may answer the question.

By Mr. Smithson:

Q. Is that correct, Doctor?

A. Would you mind reading—

(The question was read by the reporter.)

A. No; they are not the same.

Q. Then, you have changed your opinion?

A. No, sir; I haven't changed my opinion.

Q. Didn't you tell us yesterday that you had not changed your opinion from manic depressive—

Mr. Ackerly: Objection. This is argument, Your Honor. He is arguing with the witness.

The Court: Objection overruled.

A. No; I have not changed my opinion, sir.

Q. Well, then, sir, are you now telling us that what you related about two weeks ago is not correct?

A. No, sir; I am not saying that either.

Q. I see, sir. Then you are on both diagnoses, is that your testimony?

A. No, sir; I am not on both diagnoses, either.

Q. Tell me, Doctor, is it your testimony now that the defendant as of that date was suffering from manic depressive psychosis, is that right?

A. Yes, sir.

Q. Was he in a depressed state, sir?

A. Somewhat depressed at that time.

Q. I see. And you told us, sir, that in the depressed state the people of that condition don't eat, isn't that correct?

A. Not necessarily.

Q. Didn't you tell us that yesterday?

A. I say, not necessarily.

Q. Didn't you tell us yesterday, sir, that people suffering from manic depressive psychosis, where they were in the depression state, did not eat?

A. I didn't mean, sir, that all of them didn't. At some stage they don't. But I don't want you to give the impression, I don't want to give the Court or you the impression that these people didn't eat. But that eventually they get to the stage where they don't eat, if the depression lasts long enough.

Q. Yes, sir. And if I told you, sir, that at the time the defendant was arrested, he was estimated to weigh between 165 and 180 pounds, and you can see him here, sir, would you say he was in a depressed state?

[fol. 463] Mr. Ackerly: Objection to the form of the question, Your Honor.

The Court: Objection overruled.

A. Would you repeat the question?

The Court: Read the question.

(The last question was read by the reporter.)

A. Well, I will say, sir, that during that time, five years has elapsed. And in my testimony to you, I think about two weeks ago, I mentioned to you, sir—

Mr. Smithson: May I interrupt—

Mr. Carey: Let him answer the question.

Mr. Smithson: Ask the Court to instruct the witness to answer the question.

The Court: Wait a minute. Read the question again. And then answer this question.

(The last question was again read by the reporter.)

A. At what time, may I ask you that now?

Q. At the time of March 12, 1953, sir.

A. Are you comparing, sir, March '53 with now? I have got to get your question correct so I can answer it.

Q. I have asked you, sir, with regard to the date of March 12, '53, which is what we are concerned with, the date of the crime, you have stated that he was in a depressed state and in such state they do not eat. Now, taking into account [fol. 464] his weight—

Mr. Ackerly: Objection. That is not the finish.

Mr. Smithson: May I finish?

Mr. Ackerly: No.

Mr. Smithson: Then you may object.

The Court: Reframe that question.

Mr. Smithson: All right, Your Honor.

Mr. Carey: Stay within the record.

The Court: Without stating the evidence.

Mr. Smithson: Your Honor, may I have the comment of counsel also stricken as to the fact or allegation I am not staying within the record? I think that is uncalled for. Since both are jumping up again, I think one, again, should only answer.

Q. Now, Doctor, you have stated that the man was in a depressed state, is that correct, when you examined him?

A. Yes, sir.

Q. And, sir, you examined him in June of '53, isn't that correct?

A. Yes, sir.

Q. And the crime was in March of 1953, sir, March 12?

A. Yes, sir.

Q. All right, sir. And you have testified that in the depressed state they don't eat, isn't that correct?

[fol. 465] Mr. Ackerly: Objection. That is not the testimony, Your Honor.

The Court: All right. That is the question.

Mr. Ackerly: But he has already answered three times.

The Court: You may answer.

A. I said, sir, that that was one of the symptoms but it is a terminal symptom. Not the first symptom; but a terminal symptom.

Mr. Ackerly: Keep your voice up, Doctor, please.

A. I said it was a terminal symptom and not the first symptom, that they don't eat.

Q. Are you telling us, sir, you used the word "terminal" yesterday?

Mr. Ackerly: Objection.

The Court: Objection overruled.

Answer it.



By Mr. Smithson:

Q. Are you telling us you used the word "terminal" yesterday?

A. No; I am not telling you so. I am explaining it to you now.

Mr. Smithson: May the record reflect if counsel will stop shaking his head maybe the witness—

Mr. Carey: Let the record reflect the witness wasn't looking toward counsel. He was looking toward the prosecutor [fol. 466] during the entire time the question was asked.

The Court: Proceed.

By Mr. Smithson:

Q. Now, sir, it has been put to you that certain acts would be done by the defendant and he would say he had no recollection of them, isn't that correct?

A. Yes, sir.

Q. Now, Doctor, if a person wants to deny any responsibility, he is not going to admit he has any knowledge of it, is he?

A. That is right.

Q. And, Doctor, if he has any knowledge of it, he is aware of what he has done, isn't that correct?

A. He may. He may or may not.

Q. May or may not, is that what you say?

A. Yes, sir.

Q. In other words, Doctor, he can have knowledge of it and not know what he has done?

A. No, I didn't say that way. You said it that way.

Q. Now, Doctor, is that what you said in effect?

A. No; I didn't say. You said that.

Q. Doctor, if he committed a crime on March 12 of 1953, and had an awareness of that crime on March 13 as being a heinous offense, he knew the nature of the crime and of the act committed, did he not?

A. I don't know. He never testified so to me.

[fol. 467] Q. I didn't ask you that. I am talking about a person such as you say you have examined—

Mr. Ackerly: I object, if it is just a person such as a person, Your Honor—

Mr. Smithson: As the defendant.

The Court: Objection overruled.

A. Repeat that question again.

(The last question was read by the reporter.)

The Court: Restate your question.

By Mr. Smithson:

Q. Going back again, Doctor, to the facts as were presented to you by the defendant's counsel, that it was related to you that this man would do certain acts and that he would deny his recollection of such acts—and by this man, I mean the defendant.

A. Yes, sir.

Q. Now, sir, you have stated that your manic depressive psychosis has such a failure of recollection, is that correct?

A. Yes, sir; but, Your Honor, may I explain?

Q. Is that correct, Doctor? You may explain on redirect.

The Court: No. This is cross-examination. You will have to answer the question.

Mr. Ackerly: But, Your Honor, can't he have an opportunity to explain his professional opinion?

[fol. 468] The Court: No. Mr. Smithson is entitled to answer to his questions. This is cross-examination.

Proceed, please.

Is there a pending question? I think not. State a question, Mr. Smith.

Mr. Smithson: All right, Your Honor.

Q. Now, Doctor, you have assumed that the information furnished to you or made available to you on the basis of the stipulation or on the basis of certain testimony that was given to you with regard to the actions of the defendant, that he did certain things that he refused to admit any knowledge of, you recollect that, Doctor?

A. Yes, sir.

Mr. Ackerly: That is not the testimony, Your Honor.

The Court: The witness says he remembers it.

Mr. Ackerly: But that was not the question I asked.

Mr. Smithson: I think if counsel—

The Court: Objection overruled.

Mr. Smithson: I am sorry.

Q. Now, you did state to us yesterday, Doctor, that one evidence or one indication of a manic depressive psychosis is a lack of recollection, isn't that true?

A. Yes, sir. But could I say what stage? Your Honor, is [fol. 469] that permissible?

Q. You will get your opportunity, Doctor, when counsel take you back.

Now, doctor, you told us, I believe, that he would have no recollection. Putting it to you, sir, that the crime was committed on the 12th of March of 1953, and that the defendant on March 13th, which was a Friday of 1953; had a discussion with his sister-in-law, Julia Daniels—

Mr. Ackerly: Objection, Your Honor. May we approach the bench on this?

The Court: Yes.

(At the bench:)

Mr. Ackerly: A few moments ago, Mr. Smithson, in his question, referred to a recollection that this man had on March 13th, that he committed a heinous crime. Now he is talking about a discussion with his sister-in-law. There is no evidence in the record that he ever admitted this crime. But he is putting it to the witness in a way in which the witness had to admit—

The Court: It is in the form of the question; the witness will say no—

Mr. Ackerly: He is trying to suggest to this jury that this man made an admission.

Mr. Smithson: Oh, no.

[fol. 470] Mr. Ackerly: We move for a mistrial on the basis of the prosecutor—

Mr. Smithson: That is not the basis of the question. The question was put: Were you informed, or if I told you and put it to you that on a Friday he had a conversation with his sister-in-law.

Mr. Carey: Read that question.

The Court: That isn't necessary.

Mr. Ackerly: We move for a mistrial, Your Honor, and ask for the withdrawal of a juror.

The Court: Motion is denied.

(Counsel returned to trial tables.)

The Court: Mr. Smithson, I think it would be well if you would please restate your question now.

Mr. Smithson: Yes, Your Honor.

Q. Doctor, the offense alleged to have been committed by the defendant occurred on March 12 of 1953. Now, sir, I put it to you that the defendant had a conversation with his sister-in-law, Julia Daniels, on Friday, March 13, in which there was a discussion between he and his sister-in-law about his sister-in-law starting something with regard to a newspaper account of this crime. You accept that fact, Doctor? Then would you not—

The Court: No.

[fol. 471] Mr. Ackerly: It is not a fact, Your Honor.

The Court: Wait.

You asked if he accepted the fact?

Mr. Smithson: Yes, Your Honor.

The Court: He hasn't answered that.

Mr. Smithson: That is correct. I went on beyond it.

The Court: Let him answer it.

Mr. Ackerly: Your Honor, you ruled on my objection. It is not a fact. He stated it as a fact.

The Court: The question is put to the witness, not counsel.

Mr. Ackerly: Correct, Your Honor, but I would like to renew that motion we just made.

The Court: Objection overruled.

Restate that question and then let's have an answer from this witness.

Mr. Smithson: Yes, Your Honor.

Q. Now, Doctor, the crime is alleged to have occurred on March 12 of 1953. The crime charged against the defendant, which he is alleged to have committed, is that of a homicide in the course of a robbery at 723 East Capitol Street in the District of Columbia on the night of March 12. And I put it to you that he had a conversation with his sister-in-law, [fol. 472] Julia Daniels, on Friday, March 13, regarding his sister-in-law starting something with his, the defendant's, wife about a newspaper account of this crime. Do you accept that fact, Doctor?

A. I don't know whether it is a fact.

The Court: Wait a minute. What is the answer?

The Witness: I told him, Your Honor, I don't know whether it's a fact or not.

The Court: All right. He said he doesn't know.

Mr. Ackerly: We renew our motion on the basis of that question, Your Honor.

The Court: Motion overruled.

Mr. Smithson: I would like to quote from the paper, or the transcript, I should say, beginning on page 253, to the doctor, which is the examination read into the record by defense counsel of the witness, missing witness, Julia Daniels.

The Court: Are you referring to the hypothetical?

Mr. Smithson: No; I am referring to the testimony of the missing witness, Julia Daniels, read into the transcript by both counsel, Your Honor, pursuant to the stipulation in court.

The Court: That doesn't mean that the witness knows it. [fol. 473] Mr. Smithson: No, Your Honor. I know that and I want to give him that knowledge at this time as a part—

The Court: Then you must ask him to assume that fact.

Mr. Smithson: I will, Your Honor.

Q. I will ask you to assume, Doctor, that the testimony of Julia Daniels on page 253 of a transcript dated Tuesday, November 18, 1958, these questions were asked of the witness and answered.

“Question: But on the 13th of March, Friday evening, when you and he talked about this crime, he knew what happened, didn't he?

“Answer: No, he hadn't talked to me or anything about concerning the crime.

“Question: Let me ask you this: On Friday evening, March 13, 1953, weren't you and Willie Lee Stewart in the upstairs hallway of your home, 415 A Street, and didn't you have a conversation there?

“Answer: No, I did not.

“Question: And didn't Willie say to you at that time, that is, Willie Lee Stewart, ‘You are trying to start something by telling Annie that I did what is in the paper;’ didn't you then tell him that Annie had the paper and she had showed it to you?

[fol. 474] “Answer: Yes; I told him that.

“Question: And at that time, didn't he grab you by the shoulder and say, ‘You are trying to start some-

thing,' and didn't you tell him at that time that if he didn't leave you alone you would turn him in?"

The answer that the Government ~~wants to~~ that question is: "Yes." There is a further part to the answer which—

Mr. Ackerly: Oh.

Mr. Smithson: —which also expressed an opinion of that witness, Your Honor, which I do not propose to the witness at this time.

Mr. Ackerly: But, Your Honor, he wants to read part of the answer?

The Court: You may reframe the question when it comes to your turn. Mr. Smithson has a right to form his own hypothetical question.

Mr. Ackerly: I have an objection to that, then.

The Court: Objection is overruled.

By Mr. Smithson:

Q. Doctor, asking you to assume that, that shows a recollection of what transpired on the 12th as revealed by the newspaper, doesn't it?

A. No, sir; it doesn't say that.

Q. All right, then.

[fol. 475] Now, Doctor, you do accept the premise, do you not, that flight is a consciousness of guilt, do you not?

A. No, sir.

Q. Oh, you don't believe that the guilty flee?

Mr. Ackerly: Objection.

A. Not necessarily.

Mr. Ackerly: It's argument and a legal conclusion.

The Court: Objection overruled.

A. Not necessarily, sir.

Q. Now, tell me, is it your—strike that.

Did you not testify to us, yesterday, Doctor, that all morons are prone to commit crime?

A. No, sir.

Q. You deny you said that, sir?

A. I didn't say they were prone to commit crime. I did say they do commit crimes but I didn't say they were prone to do so.



Mr. Ackerly: I object to the form of the question. If it is in the record, he should read the record.

The Court: Objection overruled.

By Mr. Smithson:

Q. Did you not further say, sir, that it was characteristic of all morons to commit antisocial crimes, including crimes, and that they are more prone to do that than anybody else? [fol. 476] A. That is right, sir.

Q. You make it all inclusive of everybody who might fall below the arbitrary line of 70?

A. That is right. They are more prone to commit crime than others.

Q. You know as a fact, do you not, there are people adjusting and living adequately in our society, holding jobs in the Government, sir, who are, shall we say, far below that intelligence quotient arbitrary line of 70?

A. But do you know the percentage?

Q. Tell me, is this a functional or organic disease that you describe?

A. Which one you mean, sir?

Q. The one, Doctor, that you say is your determination, manic depressive.

A. You see, there were two statements came up, manic, and the other came up. You got through talking about people committing crimes, you suddenly shifted.

Q. I don't want to confuse you, Doctor.

A. That is what happened now.

The Court: Restate your question.

By Mr. Smithson:

Q. You described this condition as a manic depressive psychosis that the defendant is suffering?

[fol. 477] A. Yes, sir.

Q. Of course, you could not arrive at that conclusion on your first examination, isn't that correct?

A. I didn't on either one.

Q. It was based, sir, and had to be based solely on what you had to accept from the testimony of certain witnesses, isn't that correct?

A. Not from any witnesses, that I know. From Mr. Wood, who collected this data, and from his wife.

Q. I see. So what you are relating is what Mr. Wood told you, what counsel brought out as a basis of your examination, is that your testimony?

A. No, sir. You know from the statement, you know from the question yesterday given—

Mr. Ackerly: Let him answer.

Mr. Smithson: May the witness be asked to answer the question, Your Honor? He may explain.

The Court: Yes.

Mr. Ackerly: He was trying to answer, Your Honor.

A. It is not a fact, sir.

Q. It is not a fact?

A. No.

Q. Did you rely, sir, on the relation to you of the testimony of Annie Lee Stewart?

[fol. 478] A. No, sir.

Q. Did you rely, sir, on any acts that the defendant is supposed to have done towards his children?

A. No, sir.

Q. Did you rely, sir, on the testimony related by Betty Whorton with regard to any acts that he did towards her person?

A. No, sir. But from all of them.

The Court: No.

By Mr. Smithson:

Q. As I understand your amendment, that you lumped all of them together?

A. Quite so, sir.

Mr. Ackerly: Your Honor, that was not an amendment. That was a direct answer.

Mr. Smithson: May I continue?

Mr. Ackerly: I ask that be stricken.

The Court: Objection overruled.

By Mr. Smithson:

Q. Therefore you had to take the accumulation of all of this mass of statements of his sister-in-laws and his wife, is that your testimony?

A. Yes, sir; as we always do, in psychiatry.

Q. And you had to accept it as true, didn't you?

A. Well, you accept it, sir, and the Court did.

Q. I see.

[fol. 479] Mr. Smithson: I will ask that the last part of his answer be stricken because there is no indication the Court did accept it as true.

The Court: It may go out. The jury may disregard it.

The Witness: Your Honor—

The Court: No; you must give direct answers and volunteer nothing. This is cross-examination.

By Mr. Smithson:

Q. You had to accept that all as true, didn't you, Doctor? The testimony that you have related of his sister-in-laws and the wife, isn't that correct?

A. Yes, sir; I had to accept them as true.

Q. And therefore, sir, that question being a fact for the jury, if it were inaccurate, then there would be a faulty basis for your conclusion, wouldn't it?

A. Yes, sir. As far as the whole, as far the whole—

The Court: No. Just answer his question, please.

Mr. Smithson: Your witness.

I would like to ask one or two more, Counsel, if you will indulge me.

Mr. Ackerly: It is up to the Court; not up to me.

Mr. Smithson: May it please the Court, may I ask a few more? I had said I was through.

The Court: Yes. You may proceed.

[fol. 480] By Mr. Smithson:

Q. Doctor, you have said that you never changed your opinion, is that correct?

A. No, sir.

Q. From manic depressive psychosis?

A. Will you please repeat that question again?

Q. Did you not testify yesterday, sir, that you had never changed your opinion that the defendant was suffering from anything other than manic depressive psychosis?

A. Yes, sir.

Q. And directing your attention, Doctor, to a transcript of Tuesday, October 28th of 1958, were you not asked and did you not give a conclusion that the man had a schizoid affective psychosis?

A. I did.

Mr. Ackerly: I object. The question is repetitious.

The Court: The objection is overruled.

A. I did say that.

The Court: What was the answer?

Mr. Smithson: That he did say it, Your Honor.

The Witness: I did say it.

The Court: You may proceed.

Mr. Ackerly: Thank you, Your Honor.

The Court: Had you finished?

Mr. Smithson: Yes, Your Honor. Thank you.

[fol. 481] Redirect examination.

By Mr. Ackerly:

Q. Doctor, would you explain to this Court and to this jury the meaning of an affective schizoid psychosis and a manic depressive psychosis and the relation between the two in your two findings. Keep your voice up, please.

A. A schizoid affective psychosis, as described by the District Attorney just reported, is a combination of two disorders found in the same person. One is a manic that I described yesterday. Now, the District Attorney knows and the Court has already—

Mr. Smithson: I ask that the answer of the witness be to the question and not characteristics.

The Court: Don't talk about the District Attorney. Just answer the question.

A. The Court has a record that I testified—

Mr. Smithson: Objection to any record of the Court, Your Honor.

The Court: I think, Mr. Ackerly, you will have to restate the question.

Mr. Ackerly: Your Honor, the record he is referring to is what Mr. Smithson just read.

The Court: I don't think the records—

Mr. Ackerly: I would like to have the reporter read it back.

[fol. 482] The Court: No; restate it, please. You asked the difference, I think, between the two.

Mr. Ackerly: I don't—

The Court: Or something of that kind.

By Mr. Ackerly:

Q. Doctor, then, I will rephrase the question in this way: You testified here yesterday that you found as a result of your examination of June 21, 1953, and the facts which were assumed in the hypothetical question I asked you yesterday, that the defendant was suffering from a manic depressive psychosis on March 12, 1953. Mr. Smithson has referred to testimony in which you said recently that this man had either an affective schizoid or a schizoid affective psychosis. Now, I would like you to explain as fully as you can to this Court and this jury what the manic depressive psychosis is, its relation to the schizoid affective psychosis, whether there is a difference, and why you came to the two different conclusions.

The Witness: Your Honor, may I go ahead?

The Court: Just answer the question.

A. The report first that I got, that I made from a study, gave—showed that this man had a manic—

The Court: No; wait.

I don't think he understands the question.

Mr. Ackerly: I think he does, Your Honor. He is trying [fol. 483] to do his best to explain it. It is a very technical subject.

Mr. Smithson: I object to his explanation as to what the man has. The witness has been asked to distinguish between the two, affective—

The Court; I think he should answer your question directly.

Mr. Ackerly: I am trying to make the question, Your Honor, so broad that any answer would be effective if he can explain the difference.

The Court: The Court can't accept that kind of a question.

Mr. Ackerly: I am explaining merely what he asked on

cross-examination, Your Honor. I don't know how to rephrase it. I will try.

The Court: You stated it properly. But the witness wasn't answering it.

Now, watch the question.

Mr. Ackerly: You want me to restate it again, Your Honor?

The Court: Perhaps it would be well.

By, Mr. Ackerly:

Q. Doctor, if you understand the question that I asked you—

A. I think I did, sir.

[fol. 484] Q. Now, would you try to give us as direct but as clear an explanation as you can.

A. Manic depressive psychosis, I think I tried to explain yesterday afternoon, had two features to it; a period of mania in which this patient had marked psychomotor activity, extreme restlessness; and then there is a period in which there is depression, as I mentioned yesterday, with several variations.

Q. You are referring now to the chart on the board, Doctor?

A. Yes, sir; that is right.

Schizophrenia, many times patient in the course of a manic disease shows schizophrenic manifestations. They get delusions of grandeur. They have an idea they are going to rule the whole wide world. They have an idea they are going to conquer the world. They give you evidence of auditory hallucinations and illusions which are not characteristics of manic depressive at all. Therefore, when we find both in an individual, we change the term from not manic but schizoid, meaning they have both manic and schizoid manifestations. That is why I changed yesterday; because I had seen this man two different periods. At one time he showed characteristic mania. The second time, which the record showed I saw him the second time, he showed definite characteristics. Therefore, you couldn't call him a [fol. 485] manic and schizoid, so you combined both and call him a schizo-affective psychosis.

The Court: I think we will recess for about ten minutes.



The jury please keep in mind the admonition.

Mr. Carey: Your Honor, may we talk to the psychiatrist during the recess?

The Court: Mr. Smithson, do you object to that?

Mr. Smithson: No, Your Honor; I don't object to him talking to him.

The Court: Very well.

(Thereupon, at 11:00 a.m., a recess was taken until 11:15 a.m.)

#### AFTER RECESS

The Court: Mr. Ackerly, you may resume your examination.

Mr. Ackerly: Thank you, Your Honor.

By Mr. Ackerly:

Q. Doctor, you just referred to the schizoid affective psychosis as including both schizophrenic and a manic depressive psychosis?

A. Yes, sir.

Q. Now, would you explain, please, the meaning of the term "schizophrenic psychosis."

[fol. 486] A. A schizophrenic psychosis is one in which the patient shows certain factors. First of all, there is a disturbance in his mood. He is not a very cheerful person. Nor a very friendly person. He is an asocial person. There is a disturbance in his affect; that is, his relationship to his family and to his friends. They no longer exist. They are completely destroyed. His judgment also becomes warped. You can no longer rely on what he says or what he does. He has what we call tangential association. By that I mean you ask him one question and he answers you in another way. His memory is impaired. He shows evidence of hallucinations; that is, he hears voices from the outside talking to him or sending messages to him. Or, sometimes, he might even talk to himself. He has delusions. Delusions for his belief. In other words, he comes to what we call poor conclusions from the material that he gets, is said to him. There is a tendency in society for these individuals to withdraw from the group. They probably stay in the house, pull the shades down, pull the shades down in the house, stay by themselves, get up in the morning very late

or don't get up at all, just stay in bed, sleep unusually late, are extremely hostile to the family, and the people that they know most or know best are the ones that they are most hostile to.

When we get evidence of some or most of those symptoms, we say the individual has evidence of schizophrenic [fol. 487] psychosis.

Q. Doctor, your conclusion that his man was suffering from a manic depressive psychosis was based upon the condition of this defendant in March of 1953, is that correct?

A. Yes, sir.

Mr. Smithson: Counsel is testifying again, Your Honor. I ask that the counsel ask the question on what he bases it rather than giving him the question and the answer.

The Court: Well, that is better for him. However, no harm has been done.

Mr. Smithson: All right, Your Honor.

The Court: You may proceed.

By Mr. Ackerly:

Q. And your diagnosis of a schizoid affective psychosis was arrived at on the basis of an examination five and a half years later, is that correct?

A. Quite so, sir.

Q. Could five and a half years of incarceration contribute to the schizoid affective psychosis?

A. I think it could, sir. But he might have arrived at itself quite independently. I say I think it could. But it might have arrived at it quite independently.

Q. Is it inconsistent for a person to have symptoms of a manic depressive psychosis and symptoms of a schizophrenic psychosis?

A. Quite frequently so.

[fol. 488] Q. This happens quite frequently, Doctor?

A. Yes, sir.

Q. Doctor, Doctor Ben Karpman served for many years as psychiatrist at Saint Elizabeths Hospital in Washington, D. C., did he not?

A. Yes, sir.

Q. Do you know whether he is still practicing?

A. No, sir; I don't know. I have not been associated with him for almost twenty years.

Q. Was his reputation not of the finest in the field of psychiatry, Doctor?

A. To my knowledge, sir, it is, and still is.

Q. Doctor, would you expect a person who is inactive, physically, who is fed a diet of highly starch and carbohydrate food, to gain weight over a period of five and a half years?

A. Yes, sir.

Mr. Smithson: I have to object to this. I didn't know that counsel is a dietitian, Your Honor. I think it is objectionable. There is no testimony as to that.

The Court: Objection is overruled. The answer may stand.

By Mr. Ackerly:

Q. And, Doctor, your testimony yesterday was that not every manic depressive refuses to eat, is that not correct?

A. Yes, sir.

[fol. 489] Q. The fact that a man who was in that condition, did no work or had no exercise, would tend to increase his tendency to gain weight?

Mr. Smithson: Same objection to all three questions as being leading, Your Honor.

The Court: Sustained.

By Mr. Ackerly:

Q. Doctor, at what stage of a manic depressive psychosis would you expect a patient to refuse to eat?

A. When he has struck an area of severe depression. If his depression is very severe, then he probably won't eat, won't dress, won't do anything. He gets in a very, very severe depression, he might get in that stage. But not all manics, as I stated yesterday, go to that depth of depression.

Q. And if they did not get to that depth of depression, they would continue to eat?

A. They might eat more than they ever did. One of the things that we find out, a person denied love and denied affection sometimes eat. Many people eat and eat themselves out when they are separated from people they love. They just eat, and eat, and eat, and eat, to supply that affection they don't get.

Q. Doctor, is there a memory failure in every case of manic depressive psychosis?

A. I have to say yes. But I don't—I don't know if I can qualify my yes in the court.

[fol. 490] Q. Yes, you can. You can qualify it and explain it.

A. What happens in a manic depressive, sir, is this: that during the manic phase the individual recalls and goes through a series of behavior reaction, just like any other normal individual would. They hide, they deny, and they do everything that a normal individual will do. However, when they get out of that manic phase, they have no recall of all these things that they did in the manic phase. And that is the point I wanted to make; that during this manic phase, the behavior is such that you can't tell anything about it. They will talk. They will deny it and they will hide and they will do anything a normal individual will do and it's very hard to tell. You only catch up to this when the individual gets out of it. And then you find out what has happened.

I just had a nurse who was in a manic phase and worked for five months in the hospital and nobody knew she was a manic until the head nurse caught up to it.

Mr. Smithson: I believe the latter comments of the witness may be excluded. Should not have been offered and are not responsive to the inquiry.

The Court: The comments will go out and the jury will disregard it.

By Mr. Ackerly:

Q. Doctor, has this finding of yours been a consistent finding in manic depressive cases, over your 28 years of practice?

[fol. 491] A. Not only mine but others, too.

The Court: No. Yours is all he is asking about.

A. Yes.

Q. And in the literature, Doctor, that you have had occasion to examine, is this consistent with the reports and findings of other reputable psychiatrists?

A. Yes, sir.

Q. Doctor, can a person with an intelligence quotient of 65 on the Wechsler-Bellevue adult intelligence scale learn simple things such as the ability to play cards?

A. Yes, sir.

Mr. Smithson: I don't believe this was the subject of cross-examination, Your Honor, and I think he is therefore bound.

Mr. Ackerly: It was, Your Honor. It was the subject yesterday, and it is in the record that he went into the question of this man's intelligence, whether he went in the Army, how the Army accepted him. I think I am obliged to clear this up.

Mr. Smithson: I don't think I went into the intelligence quotient of 65 or what the man could do.

Mr. Ackerly: I think we can consult the record.

The Court: I will permit the answer.

By Mr. Ackerly:

Q. Doctor, could a person with this intelligence quotient learn to drive a truck?

[fol. 492] A. Yes, sir.

Q. And could he learn to count money?

A. He could.

Q. And wouldn't it be likely that he would learn to count money if he lived in a normal existence such as in a home, in a family and in the Army?

A. Well, yes, to—He could count up to a certain point.

Q. And is that limit different with different patients?

A. No, sir. With an I.Q. of 65 an individual has about a third grade education. He can't go any further.

Q. Third grade?

A. Yes, sir. A third grade education, and he can't go any further. Now, you figure how much a third grade education child can count. You get an idea what an individual with an I.Q. of 65 can do, in terms of counting. I think that answers your question.

Q. Doctor, does a person who is suffering from this type of mental defect, intelligence quotient of 65, engage in antisocial activity consistently and constantly?

Mr. Smithson: I believe counsel is doing the most adequate job of testifying. I do and must object, Your Honor.

The Court: You may answer. You may answer it.

A. Would you mind repeating the question?

(The last question was read by the reporter.)

[fol. 493] A. Well, I would not say consistently or constantly. But I will say he has a greater leaning than an individual with an I.Q. above that level.

Q. Doctor, can you explain to this Court and the jury the factors that affect the ability of a mental defective with an I.Q. of 65 to adjust to his environment?

Mr. Smithson: Objection to the form of the question. It assumes a predicate that has not been established.

The Court: Objection overruled.

You may answer.

A. Will you read—

The Court: Doctor, if you forget about the lawyers, just keep your mind on the question, we won't have to re-read it so often. The objection is directed to the Court, not the witness.

(The last question was read by the reporter.)

A. One of the difficulties that an individual has with that I.Q. is the fact that he is called upon by society to assume certain responsibilities with which he does not have the machinery to operate. With an I.Q. of 65 it puts him in a certain area where he has to do certain things, and what happens is his needs and his urges are greater than his ability to produce. The result is severe frustration and anxiety, result in these cases.

[fol. 494] In other words, if an individual has a low I.Q., he sees the same thing you see, he wants the same thing you want, but he doesn't have the wherewithal to get it. And, therefore, he is more likely to take the more primitive method of getting what he wants than the actual way that you or I would probably do, that is, trying to work and save for it. That particular pattern is a very, very weak one in an individual with a low I.Q.

Q. Doctor—excuse me. Please continue.

A. It's for that reason in schools we have the difficulty with children when they get as far as the third grade.

Q. Keep your voice up, please.



A. It is for that reason why in schools we have that problem with children when they get to the third and fourth grade. When they have a low I.Q. they begin to become a problem to the teachers because they are being pushed against a situation where they have no means at all of combatting. They can't reach it. And since they can't, they fight back in their behavior in an antisocial way.

Mr. Smithson: I don't believe the answer is responsive, Your Honor. The question has a basis, a person who was a mental defective, which was a predicate not laid, an I.Q. of 65, and the witness is insisting on now getting into the school situation, talking about something not before this [fol. 495] jury, on which he can't be examined; therefore, I object to his answer and ask that that again be stricken.

The Court: The answer may stand.

Proceed.

A. And therefore the behavior pattern is one in that instance of frustration, and behavior disorder, characteristic behavior disorder, which is due to this low I.Q.

Q. And could this frustration build up to a point, Doctor, where it would be a contributing cause to a mental disease or a psychosis.

A. Yes, sir.

Q. Doctor, a person with an I.Q. of 65, that mental deficiency, would he be the type of person who would fear what he didn't understand?

Mr. Ackerly: May I rephrase the question, Your Honor?

The Court: Yes; reframe the question.

By Mr. Ackerly:

Q. Doctor, a person with a low I.Q. of 65, would he be inclined to fear authority, to run from situations and, for example, run from a situation of the police or other people in authority?

A. Yes; he could do that.

Q. Doctor, Mr. Smithson asked you a while ago if, in answering the question that I asked you yesterday, the hypothetical question, some of the material in there or all [fol. 496] of the material in that question was inaccurate,

your conclusion would be inaccurate. And I believe you answered yes?

A. Yes, sir.

Q. Now, if the statements that I gave you yesterday were accurate, would your conclusion be accurate?

A. Yes, sir.

Mr. Ackerly: You may examine.

Recross-examination.

By Mr. Smithson:

Q. I believe you said, Doctor, that the man, with this I.Q. of 65, would run if he was in fear?

A. Sure.

Q. You mean, then, that only those with an I.Q. of 65 runs, is that your testimony?

A. No, sir.

Q. I see.

Mr. Smithson: Your witness.

Mr. Ackerly: Well, Your Honor, that wave—I object—is highly prejudicial.

Mr. Smithson: I had finished with the witness.

Mr. Ackerly: I would like to approach the bench. I haven't finished with you.

I would like to approach the bench and make a motion, Your Honor.

(At the bench:)

Mr. Ackerly: That is the most atrocious conduct I have [fol. 497] ever seen of a prosecutor, and I have been a prosecutor myself, Your Honor. I would like the record to reflect Mr. Smithson waved his hand in a manner of disgust of this man's—

The Court: Motion is denied.

Mr. Smithson: It was not disgust. I was through and that was all. I was through with the witness. I asked him one question and that is all and said that is his witness, as the record will reflect. The counsel wants to make gratuitous statements about conduct, we can really go into it.

Mr. Ackerly: Motion denied.

The Court: Motion denied.

(Counsel returned to trial tables.)

Mr. Ackerly: You are excused, Doctor.

(The witness stepped down.)

The Court: Mr. Ackerly, your next witness, please.

Mr. Carey: That is our case, Your Honor.

The Court: Mr. Smithson, you may proceed.

Mr. Smithson: Yes, Your Honor.

Mr. Carey: Your Honor, I think we can make this from the open court.

The Court: If that is something which should be said to the Court—

Mr. Carey: We would like to renew our motions at this time.

The Court: Well, come to the bench.

[fol. 498] (At the bench:)

Mr. Carey: We would like to renew the motions heretofore made at the end of the Government's case.

The Court: Motion denied.

(Counsel returned to counsel tables.)

DR. ELMER KLEIN was called as a witness by the Government in rebuttal and, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Smithson:

Q. Your name, sir, is Elmer Klein, is that correct?

A. Yes, sir.

Q. Your occupation, Mr. Klein?

A. Physician.

Q. You are a doctor; graduate of what school?

A. I am graduate of Indiana University.

Q. When, Doctor?

A. 1925.

Q. And following your graduation, Doctor, did you specialize in any field of medicine?

A. Yes; I specialize in psychiatry.

Q. In that regard, sir, would you relate for us your specialty and what it has embraced.

A. Yes. You mean my training?

Q. That is correct, sir.

A. Following my graduation I was at Saint Elizabeths [fol. 499] Hospital on the staff for three and a half years, and for two years after that, at Johns Hopkins University Hospital in the department of psychiatry; after which I have had—I have worked in hospitals, on the staff of the mental hospital, mental hygiene clinics, until about—I came out of the service in 1946. I was in the naval service from '41 to '46. And since then I have been in the private practice of psychiatry.

Q. What was your particular duty while in the Navy, sir?

A. I was a psychiatrist there.

Q. Now, Doctor, have you been engaged actively in the field of psychiatry since your return from service?

A. Yes; throughout 32 years.

Q. And your place of practice, Doctor?

A. 1703 Rhode Island Avenue, Northwest.

Q. In the District of Columbia?

A. In the District of Columbia.

Q. Have you had occasion to qualify as an expert as a physician in the field of psychiatry for the United States District Court in the District of Columbia?

A. I have many times.

Q. And have you qualified, sir, in other courts?

A. Yes; in the Maryland.

Mr. Smithson: I submit the witness is qualified, Your Honor.

[fol. 500] The Court: You may proceed.

By Mr. Smithson:

Q. Doctor, directing your attention to the month of March of 1953, did you have occasion to examine a patient by the name of Willie Lee Stewart in that period?

A. Yes, I did.

Q. Do you recall, sir, the date?

A. I recall it by consulting my notes, and that was on March 26, 1953.

Q. And that person, is he here, sir?

A. Yes; I see him here now.

Q. ~~How is he~~ dressed at the present time, Doctor?

A. How is he dressed? I don't—

Q. Describe his clothing; what he is wearing now.

A. He seems to be wearing a jacket of some sorts; an undershirt; and trousers and shoes. An average sort of—

Q. Would you step down and point him out, Doctor.

(The witness stepped down.)

A. I think this is the man right here.

Mr. Smithson: Is there any question about it, Counsel?

Mr. Ackerly: I don't know.

Mr. Carey: The doctor doesn't know. He says "I think."

The Court: Doctor, step around and put your hand on [fol. 501] his shoulder.

(The witness touched the defendant.)

The Witness: I think this is the man right here.

Mr. Smithson: All right, Doctor.

May the record reflect the—

Mr. Ackerly: No, I object to that. I object to anything further by this witness. His answer is clear on the record.

Mr. Smithson: I believe he said—

The Court: The record will show that the witness has identified the defendant.

Mr. Ackerly: Did Your Honor hear the statement the doctor made?

The Court: Come to the bench.

(At the bench:)

Mr. Ackerly: When the doctor walked over behind me, Your Honor, he said "I think this is the man I examined." On that basis, he cannot testify.

Mr. Smithson: I don't know why he can't.

The Court: I will ask the doctor.

(In open court:)

The Court: Doctor, do you positively identify the man that you examined?

The Witness: Your Honor, I can't say positively. He has [fol. 502] changed a great deal but I am quite sure that is the same man.

The Court: Very well.

Mr. Ackerly: Then we object to his testimony.

The Court: Objection overruled. You may proceed.

(Counsel returned to trial tables.)

By Mr. Smithson:

Q. Tell me, Doctor, how has he changed since you have seen him?

A. I think he is much stouter than he was.

Q. Much stouter?

A. Yes. And, of course, older; five years. That makes a difference.

Q. Now, Doctor, at the time you examined the defendant, were you acquainted with the fact that he was charged with an offense?

A. Yes; I was.

Q. And where was he when you examined him?

A. I saw him in the District Jail.

Q. For how long?

A. An hour.

Q. What was his behavior during the time that you examined him, sir?

A. His behavior was perfectly normal I thought. He was cooperative. Talked to me in a normal fashion, answered my [fol. 503] questions, and in general he behaved like any other normal human being.

Q. Tell me, sir, was he aware, to you, of the fact that he was charged with a crime?

Mr. Ackerly: Objection.

The Court: Objection overruled.

You may answer it.

A. Sir?

The Court: You may answer the question.

A. He denied it.

Q. Not whether or not be committed. Was he aware—

Mr. Ackerly: I move that answer be stricken.

A. He was aware of it, yes. But he denied having committed it.

Mr. Ackerly: I move that be stricken as not responsive.

The Court: Motion denied.



By Mr. Smithson:

Q. Now, Doctor, did you have any inquiry of him regarding his background, education?

A. Yes; I do.

Q. Did you make it at that time?

A. Yes; at the time.

Q. What inquiry did you make and what information did you gain from him regarding, one, his education?

[fol. 504] A. Well, he had very little schooling, he told me, and he left school when he was in his early teens, probably 13 or 14, only reached the or finished the fourth grade. But he was able to read and write.

Q. You say he was able to read and write?

A. Yes. I tested him on some writing and he was able, and on reading, he was able to read and write.

Q. All right, Doctor. Did he say where his home was or where he had gone to school?

A. He told me he came from South Carolina. I don't recall the name of the town. I couldn't make out my note just what the name of the town was in South Carolina, where he worked on the farm. And then finally came to Washington when he was about—in 1942, I believe, when he was about 19 or 20 years old.

Q. You say he came here in '42?

Mr. Ackerly: Objection. He is leading and he is repeating.

Mr. Smithson: I didn't repeat it, Your Honor. I wanted to make sure I heard.

(The answer was read by the reporter.)

Mr. Smithson: In view of the answer, I withdraw the question that I propounded, Your Honor, as repetitious.

Mr. Ackerly: May the record also show the doctor has now opened a folder and has been reading?

[fol. 505] Mr. Smithson: The doctor just opened it, Your Honor.

The Court: Find out what it is.

By Mr. Smithson:

Q. What are those documents?

A. These are my notes. The notes that I took at the time that I examined the man and also my report to the United States District Attorney.

**Q.** All right, sir. Doctor, they are open now, you can leave them open.

Now, Doctor, did you gain any information from the defendant relative to his military service?

**A.** Yes, sir.

**Mr. Ackerly:** Objection as leading:

**The Court:** Objection overruled.

**A.** Yes, sir; I did.

**Q.** What information, if any, did he give you?

**A.** He told me that he was in the Army, and I believe that he was discharged in 1945, after which he reenlisted, following which he got into some altercation with another soldier, I believe in 1947, at which time he stabbed another service man and was discharged with a dishonorable discharge.

**Q.** All right. Now, Doctor, did you make any inquiry of him of any heredity background of mental disease or defect?

**A.** I questioned him about his father and mother. He knew nothing about his father. He said his father—well, I [fol. 506] don't know whether he died or just what happened to him but, at any rate, he knew nothing of his father. And I don't think that he knew too much about his mother either. But, as far as I recall, there was no evidence of any mental disease in the family; family of which he knew.

**Q.** Did he tell you, sir, with whom he lived in this southern community?

**A.** His grandmothers, I believe.

**Q.** Doctor, what is a psychosis?

**A.** Psychosis is a mental disease.

**Q.** Did you find any psychosis or neurosis? What is a neurosis?

**A.** A neurosis is what is commonly termed a nervous disease, nervous disorder.

**Q.** Tell me, Doctor, did you find any psychosis or neurosis or any mental disease on March 26th of 1953 when you examined the defendant?

**A.** No, sir; I did not.

**Q.** Doctor, did you find any mental defect in the defendant on that date?

**A.** I thought that he was intellectually rather limited but I didn't believe at the time that he was mentally defective.

Q. You did not believe him to be mentally defective, is that your statement?

[fol. 507] A. No; I did not believe that he was mentally defective.

Q. All right, Doctor. Doctor, in that regard there is some testimony I would like to put to you. If you knew this defendant had been in 1946, following his conviction in this matter that he has related to you in the court martial—

Mr. Ackerly: Objection to the form of the question, Your Honor.

Mr. Smithson: I am asking the doctor to assume this, Your Honor.

Mr. Ackerly: That is not what you asked. I object to the form of the question.

The Court: Objection overruled.

By Mr. Smithson:

Q. Doctor, assuming then, and if you had known, and assume this fact, that this defendant in 1946, after his conviction in a court martial for the offense which he related to you, was given what is known as a Wechsler-Bellevue intelligence test, on which he achieved a verbal subtest of 63 and a performance subtest of 76, with an overall rating of 65, sir, according to that statement, where would he fall within the level of the public as to intelligence?

A. Low average.

Q. Low average?

A. Yes, sir.

Mr. Ackerly: Low, did you say? Low?

[fol. 508] The Witness: Low.

Mr. Ackerly: Average?

The Witness: Yes.

By Mr. Smithson:

Q. Would you say he fell in the feeble-minded range?

A. That would be questionable. I think he would be considered in the upper level of the moron group or, as I said, low average. Very low average.

Q. That is, sir, based on this achievement of this intelligence test?

A. Yes.

Q. Now, tell me, sir, would the fact of his limited education, would this fact—yes or no—have any effect on what he might achieve under that test?

A. Yes; I am quite sure that it would.

Q. Would your opinion be in any way influenced by his result on the performance test of 76?

A. No, sir.

Q. But, Doctor, this intellectual level of 65, which was assigned in this test, would that, sir, be such a defect or such a condition, caused by any trauma or any medical disease, psychosis, mental disease, psychosis, that it would cause him to perform the crime of robbery and murder?

Mr. Ackerly: Objection. It is entirely leading; entirely leading.

[fol. 509] The Court: Objection overruled.

You may answer it.

A. I—Maybe perhaps you better restate that question to me.

Mr. Ackerly: Can we have the reporter read it, Your Honor?

The Court: No. He asked to have it restated. Counsel will restate it.

By Mr. Smithson:

Q. Assuming an intellect, Doctor, of 65, and assuming what you have related to us as your finding from your examination, would that finding, sir, as to that person, the defendant, Willie Lee Stewart, and taking into account your examination, would that finding, sir, cause him to commit a crime of robbery or murder?

Mr. Ackerly: Objection to the form of the question. The test is not cause; it is result, Your Honor.

The Court: Objection overruled.

A. I say it would not.

Q. All right, I will rephrase it, sir. Assuming the defendant, with the condition of 65 on this intelligence quotient test, and assuming what you found from him on your examination, and assuming, sir, that he was identified by a witness as being a person who shot her father in her presence, that he was identified, sir, also by means of fingerprints as being

[fol. 510] on the scene, sir, would you say that that crime which he was charged with was the result of any intelligence quotient test?

Mr. Ackerly: Objection. And may I have the same opportunity that Mr. Smithson had yesterday to add to the hypothetical question?

Mr. Smithson: I wasn't permitted to add to it.

The Court: Objection overruled.

A. I would say no, it would not result in it.

Q. Tell me, Doctor, to get a rating on this Wechsler-Bellevue test, do you or do you not have to have a certain amount of formal education?

A. In many of the items you do; many of the items of the test you do. But a good many of them are arranged in such a way that one does not have to have a formal education.

Q. All right, sir. Tell me, would they in any way apply to what is known as the performance subtest?

A. The performance subtest, it does not require a special formal education.

Q. Now, Doctor, this defendant, on your examination and based on what you determined from your examination, can you advise the Court, ladies and gentlemen of the jury, does he know or did he know the difference between right and wrong as of March 12, 1953?

Mr. Ackerly: Objection.

[fol. 511] The Court: Objection overruled.

A. In my opinion he knew right from wrong.

Q. All right, sir, and assuming, sir, that he knew right from wrong, can you express an opinion whether or not he was capable of embracing the right and rejecting the wrong?

A. I would say that he was capable of embracing the right and rejecting the wrong.

Mr. Smithson: Would Your Honor indulge me just a moment?

The Court: Yes.

By Mr. Smithson:

Q. Doctor, during the course of your examination of the defendant, did you at any time discuss current events at that time?

Mr. Ackerly: Objection. As leading.

The Court: Objection overruled.

A. Yes; I did. To determine his mental awareness of what is going on in the world. And he was able to tell me the name of the President. He was able to tell me who was before him, two or three Presidents, in fact, prior to the existing one, and various other items, names of large cities and various items of information that has to do with the determination of the individual's mental status, or mental capacity.

Q. Tell me, Doctor, was there any calculations involved in your examination?

A. Yes.

[fol. 512] Q. What was the nature of the calculations?

A. It was a very simple one. I asked him to subtract seven from a hundred and to go all the way down, subtracting seven from each number that would be left, and he did it entirely correctly. Slowly but correctly.

Q. I believe you have testified earlier, sir, he did or did not do some reading for you?

A. I don't recall that.

Q. Would your notes reflect whether or not that was so?

A. No, sir. No, sir; it does not.

Q. Doctor, are you familiar with what is known as manic depressive psychosis?

A. Yes; I am; sir.

Q. What is it?

A. Manic depressive psychosis is a mental disorder in which there are violent fluctuations of mood from one of a great deal of euphoria or happiness, overactivity, overtalkativeness, distractability, in the person's various activities, want to do one thing and never finishing it, doing something else. A half dozen things at more or less the same time. That mood lasting sometimes for months, sometimes for a year or two, and then swinging in the opposite direction after that. This mood of elation or happiness dying [fol. 513] down and the person assuming a mood of depression or melancholia in which the person feels guilty and hopeless and miserable and retarded, not being able to think and remember, not being able to sleep well, and eat well, and the loss of weight and appetite, and that may go on for a period of time, sometimes months, sometimes years. And



that type of illness fluctuating from one of high level of activity and mood to one of low level and low mood.

Q. Doctor, during your examination did you find any indication of a manic phase or manic depressive psychosis in the defendant?

A. No; I found nothing of the sort.

Q. Did you find any depressive or depression state of manic depressive psychosis in the defendant?

A. No, sir; I did not.

Q. Doctor, in the course of going from this manic to the depressive state, sir, is there any symptomatology that would carry over that would be readily ascertainable or discovered by a trained psychiatrist?

A. Ascertainable when?

Q. At the time of examination, sir.

A. Oh, yes, without a question. Sure. Yes.

Q. Doctor, do they go from the manic stage to the depressive stage in overnight, so to speak?

[fol. 514] A. No; not unless—it's what is known as a mixed type of mental depression, in which you sometimes get one and sometimes the other, more or less interchangeably. But, generally speaking—

Mr. Ackerly: Let him finish.

A. Pardon?

Q. Go ahead, Doctor.

The Witness: I am sorry.

Mr. Ackerly: I said, please finish. He was interrupting you.

A. But, generally speaking, the manic phase lasts for a certain length of time, some months, I said. And then there is a gradual incline in that high mood to one of depression and that continues for a while. Although we do get occasionally some mixture of both.

Q. In that question of mixture of both, or this mixed-up psychosis, is there available at the time of such examination symptomatology that would be apparent to a trained psychiatrist to that condition?

A. Without a doubt.

Mr. Ackerly: Objection, as leading.

Mr. Smithson: I understood there was an objection.

Mr. Ackerly: I objected, that that is a leading question, Your Honor.

[fol. 515] The Court: Objection overruled.

Q. Doctor, what is a schizoid affective personality or disorder?

A. Schizo-personality.

Q. Psychosis, I should say.

A. It is a form of mental disease in which there are elements of both a manic or depressive condition as well as that of a so-called schizophrenic mental disease.

Q. Tell me, Doctor, did you see any indications of any elements of schizoid affective psychosis in the defendant on March 26, 1953?

A. No, sir; I did not. As I indicated, I found no evidence of any mental disease.

Mr. Smithson: Indulge me a moment, Your Honor please.

Q. Doctor, assuming that a defendant, the defendant on March 12, that is, the defendant, this defendant, Willie Lee Stewart, on March 12th of 1953, was in a manic state of manic depression psychosis, would such be readily—such symptomatology still be existent and readily ascertainable in the defendant on March 12 when you examined him?

Mr. Ackerly: Objection, as leading, Your Honor. This is entirely leading.

The Court: Objection overruled.

You may answer.

[fol. 516] A. I think you meant March 26:

Q. March 26, yes, sir.

A. In all likelihood, yes.

Q. Going, sir, to the depression state of manic depressive psychosis: Assuming that the defendant was in a depressed state on March 12th of 1953, would the symptomatology still be in existence and discoverable by a trained psychiatrist on March 26?

A. I would say so, yes. In all likelihood.

Q. Doctor, were you able to obtain any information on family background from the defendant?

A. Just more or less what I told you, namely—

Mr. Ackerly: Objection. It's repetitious. He said "I told you."

Mr. Smithson: May the witness continue his answer, Your Honor?

A. I said more or less what I said before. He told me something of his father, that his father, he knew nothing about him practically. He died when he was quite young. His mother, he didn't know too much about her.

The Court: Anything that you hadn't related before?

The Witness: No, sir.

Mr. Ackerly: I move it be stricken as repetitious, Your Honor.

[fol. 517] Mr. Smithson: It is a predicate.

The Court: It may go out.

By Mr. Smithson:

Q. Doctor, based on your history which you obtained from him, was it or was it not suitable for the purpose of your examination, his family history and background?

A. Yes; it was suitable.

Mr. Smithson: Your witness.

Cross-examination.

By Mr. Ackerly:

Q. That is, in your opinion, it was suitable, is that not correct?

A. Yes.

Q. Do you always rely entirely on the family history and information you get from a patient to make a diagnosis, Doctor?

A. Say that again, please?

Q. Do you always rely upon the information and history that you get from the patient to make a diagnosis?

A. Not always; no.

Q. Do you ever consult any other sources for history?

A. Yes.

Q. Do you do this frequently?

A. Frequently enough, yes.

Q. Would you say that it is more often that you consult other sources than the patient for a history?

[fol. 518] A. No, I would say so. No; not more often.

Q. In the majority of cases, then, Doctor, is it your testi-

mony that you rely solely upon the history given to you by the patient in making your diagnosis?

A. That is right.

Q. And these patients are normally sick, are they not, Doctor?

A. Say that again?

Q. Sick. Mentally ill.

A. What was the whole question?

Q. I said most of your patients—

A. I understood that. You said are these patients something, that is what I didn't get. The last part of your question I didn't get.

(The question and answer was read by the reporter.)

Q. Most of your patients are mentally ill, are they not, Doctor?

A. Yes; mentally or nervously ill.

Q. Because you are a psychiatrist?

A. Yes.

Q. And you say you make a diagnosis on the majority of your patients who are mentally ill on the basis of the history given you by that patient?

A. That is right.

Q. Doctor, a first, new patient comes to your office, do you [fol. 519] make a psychiatric evaluation of that patient?

A. Yes.

Q. What is the average time that it takes you to make such an evaluation?

A. Oh, about half to three quarters of an hour.

Q. Does it ever take you longer than that to determine whether a person has a mental disease?

A. No; I don't think so.

Q. Do you rely upon psychological testing, Doctor?

A. To a very limited extent.

Q. You don't believe in psychological testing?

A. I didn't say that. I say I rely on it to a very limited extent.

Q. You are not a psychologist, are you, Doctor?

A. No.

Q. May I see the notes you have been reading, Doctor?

A. Yes. Here is—

Q. Which is your report?

A. Right here.

Mr. Ackerly: May I have these notes to examine, Your Honor?

The Court: Yes.

By Mr. Ackerly:

Q. At whose request did you examine the defendant, [fol. 520] Doctor?

A. The United States Attorney.

Q. And were you paid for that examination?

A. I was.

Q. And by whom, sir?

A. That I couldn't tell you. I suppose by the United States Government. The District Government. I know I sent a bill for it and have been paid.

Q. How much were you paid for that one-hour examination, Doctor?

A. Fifty dollars.

Q. Fifty dollars?

A. Yes. I think. I am quite certain that was right.

Q. Doctor, in manic depressive psychosis, does the person go immediately from the manic stage to the depressed stage?

A. Not immediately, no.

Q. How long does it take for a person coming out of a manic stage to get into a depressed stage?

A. That varies. But that transitional phase can be anywhere from a few days to perhaps a month or two.

Q. It could be a matter of as little as three or four days?

A. I suppose so. Offhand, I can't recall any who have gone into that quickly.

[fol. 521] Q. Does a manic depressive, Doctor, ever level off at any state of normalcy?

A. Yes.

Q. How long do these periods of normalcy last, Doctor?

A. They may last a lifetime.

Q. This is a disease which in your opinion, then, can be permanently cured?

A. Not cured. But in remission.

Q. Beg your pardon?

A. Not cured but in permanent remission.

Q. Doctor, if a patient suffering from a manic depressive psychosis goes into this state of normalcy on a permanent basis, would you still classify them as a manic depressive?

A. No; excepting in their personality makeup but not suffering from the disease.

Q. They are not suffering from a mental disease?

A. That is right.

Q. And if you examine a patient in that state of normalcy and examine that patient alone and consulted no other history, could you in every case determine that that person had had a manic depressive psychosis?

A. No.

Mr. Smithson: I believe the question should be limited to [fol. 522] this case, Your Honor.

Mr. Ackerly: I am not sure the jury heard that answer, Your Honor. I think the doctor said he could not.

Q. Is that correct, Doctor?

A. If I understood your question correctly, which I understood to mean if I examined a patient who had a manic depressive psychosis but currently does not have it, whether in that examination during his well-being, if I could tell whether he had a manic depressive psychosis; was that your question?

Q. Yes.

A. I said no, I could not.

Q. Doctor, do you know a person by the name of David Wechsler?

A. I know of him.

Q. You know of him?

A. Yes.

Q. Who is he, Doctor?

A. He is a psychologist, who devised the Wechsler-Bellevue test.

Q. He devised the Wechsler-Bellevue intelligence test, is that not correct?

A. Yes.

Q. He is also chief psychologist at Bellevue Psychiatric Hospital?

[fol. 523] A. That is right.

Q. And he is widely known in his field?

A. Yes, I think so, as a psychologist.



Q. And you are not a psychologist, are you?

A. I am not, no.

Q. Incidentally, do you know Dr. Ben Karpman?

A. Do I know him?

Q. Yes.

A. Very well.

Q. How long have you known him, Doctor?

A. Thirty-three years.

Q. Is he a psychiatrist?

A. Yes.

Q. Did he practice at Saint Elizabeths Hospital?

A. He was on the staff there for a number of years, yes.

Q. What is your opinion as to his competency in the field of psychiatry?

Mr. Smithson: I don't believe that is the subject of the direct examination, Your Honor. I don't believe that that is proper on cross.

The Court: You may answer.

The Witness: I would prefer not to, Your Honor, if I may.

[fol. 524] Mr. Ackerly: I won't insist on it. I won't insist.

Q. You know how long the Wechsler-Bellevue scales have been used for psychological testing, Doctor?

A. I would say for at least 20 years; 15 or 20 years, I think.

Q. You were in the Navy, you said, during the war?

A. Yes.

Q. Were they used pretty widely in the service during the war?

A. Yes; they were used.

Q. Could you give us any estimate, Doctor, of how many people you think in those twenty-some-odd years have been tested on the Wechsler-Bellevue intelligence scale?

A. No, I couldn't.

Q. Would you say more than a million, in your opinion?

A. I am sure of it.

Q. Doctor, if David Wechsler, in 1958, classified a person with an I.Q. of 69 and below on the Wechsler-Bellevue adult intelligence scale as defective, would you agree with that?

A. I don't think so; in every case, I would not.

Q. You would not agree with David Wechsler?

[fol. 525] A. No.

Q. Doctor, do you know what percentage of the population, according to the Wechsler-Bellevue adult intelligence scale, has an I.Q. of 69 and below?

A. What percentage?

Q. Yes, sir.

A. It depends on what part of the country. I suppose in the South the percentage would be relatively high. I would say at least 25 per cent.

Q. If I told you, Doctor, that David Wechsler's findings, as reported in January, 1958, for the entire country are that 2.2 per cent of the population has an I.Q. of 69 and below, would you agree with that?

A. I'd have to, I suppose, if it says so.

Q. Because you are not a psychologist, are you?

A. No; I am not.

Q. And if I told you, Doctor, that this average intelligence that you referred to on your direct examination is classified by Mr. Wechsler at an I.Q. level of 90 to 109, would you disagree with that?

A. Yes, I would.

Q. You would?

A. Yes, I would.

Q. You testified a little while ago, I believe, Doctor, that [fol. 526] a moron is a person of low average mentality?

A. No. Below the low, or average, I'd say.

Q. You say a person of average intelligence is a moron?

A. Who has had no school background, who has had no educational background, can very readily be classified a moron on the basis of the intelligence test.

Q. Who has had no educational background?

A. That is right; yes. Or very little.

Q. What do you mean by "very little," Doctor?

A. Very little, just that. I suppose a few weeks or a few months, something of that sort. Hadn't learned to read or write.

Q. Would you keep your voice up? I am having difficulty.

A. I said hasn't gone to school for any reasonable length of time; maybe a few weeks or a few months out of the year.

Q. Now, Doctor, so I understand you, so I understand now, Doctor, a person who has not had any schooling, but who is of average intelligence, is in your opinion a moron, is that correct?

A. No; he is not.

Q. Would you restate it for me; Because that is the way I understood you.

[fol. 527] A. What I said was a person of average intelligence with very little schooling can be classified in this moron group on the basis of the Wechsler-Bellevue psychological test.

Q. You think, then, that a person of average intelligence with very little schooling would fall within the lowest 2.2 per cent of the population, is that correct?

A. Could very well, yes.

Q. Would that include Andrew Jackson, the former President of the United States, who had absolutely no formal education at all, Doctor?

A. I don't know anything about Andrew Jackson.

Q. You don't know anything about him?

A. Other than what I studied in school.

Q. Doctor, I'd like to read one passage from Mr. Wechsler's book. I'd like you to listen to it and give me your opinion as to whether you think this is correct.

"Mental deficiency, unlike typhoid fever or general paresis, is not a disease. A mental defective is not a person who suffers from a specific disease process, but one who by reason of intellectual arrest or impairment is unable to cope with his environment to the extent that he needs special care, education, and institutionalization. A mental defective is characterized not only by a lack of ability to care for himself but also by an in- [fol. 528] capacity to use effectively the abilities he does have. His actions are often not only senseless and inadequate but perverse and anti-social as well. He may be not only stupid but vicious. And the question arises why he is sometimes one and not the other."

Do you agree with that statement, Doctor?

A. No.

Q. You do not?

A. No.

Q. And you are not a trained psychologist, is that correct?

A. No; I am not a psychologist.

Q. And David Wechsler is about the world's leading authority on adult intelligence, is he not?

A. Well, he is well known, as I said. But, any rate, that is a misinterpretation of the whole statement. I mean, your implications, are an entire misinterpretation.

Q. If you think I misread it, would you like to read it?

The Court: Keep your voice up.

By Mr. Ackerly:

Q. Are you suggesting that I misread this?

A. No, I didn't suggest that. I think that the inferences you draw from it are entirely wrong.

[fol. 529] Mr. Ackerly: For the record, Your Honor, I am reading from a book called "The Measurement and Appraisal of Adult Intelligence" by David Wechsler, Fourth Edition, published January 1958.

Q. Doctor, you said that in one hour of talking to this man, you found no evidence of psychosis, no evidence of neurosis, no evidence of a mental deficiency?

A. That is right.

The Court: Doctor?

The Witness: Yes; that is right.

By Mr. Ackerly:

Q. Tell us how you measured his mental deficiency, Doctor, or his lack of mental deficiency.

A. Well, largely by the things, items, on which I questioned him. His informational assets. His capacity to do certain arithmetical tests.

Q. The arithmetical tests is the one you had him subtract seven from one hundred?

A. Yes; 7 from 100.

Q. I believe you said he did it slowly but accurate?

A. That is right.

Q. Could not the average child of ten do the same thing, Doctor?

A. Could the average child of ten do the same thing?

Q. Yes.

[fol. 530] A. A bright child would, I think, yes.

Q. You also said, I think, that he knew the name of the President of the United States, is that correct?

A. That what?

Q. He knew the name of the President of the United States?

A. Yes, he did. And he knew three or four of them backwards.

Q. How many back did he know?

A. He knew Truman, he knew Roosevelt. I don't know whether he knew any beyond that.

Q. He knew the President, Truman and Roosevelt, is that correct?

The Court: Yes. He just said that.

By Mr. Ackerly:

Q. Would not the average eight or nine-year old child know the names of the present President and possibly the one just preceding him, Doctor?

A. Rather unlikely, but may.

Q. Well, a person who would have a second or third grade level of intelligence, who has been living in the world for some twenty-some-odd years, would likely know the name of the President, would he not, Doctor?

A. Say that again? A person who had been living—

Q. A person 25, 26 years of age—

[fol. 531] A. Yes.

Q. Even though he would have a mental level of maybe the first or second grade, would probably know the name of the President of the United States?

A. Well, that is questionable. He may and then he may not.

Q. Doctor, have you ever had a patient whom you considered suffering from a psychosis, who also knew the name of the President of the United States?

A. Yes, of course.

Q. So that doesn't exclude psychosis?

A. Of course not.

Q. And it doesn't exclude mental deficiency, does it, Doctor?

A. No, it does not.

Q. In fact, Doctor, you have had patients whom you have considered suffering from a psychosis who could do much more complicated arithmetic problems?

A. Yes, that is right.

Q. And who knew much more about the awareness of his environment, isn't that correct?

A. That is right.

Q. Doctor, what I.Q. did you arrive at for this man?

A. I didn't arrive at any I.Q.

[fol. 532] Q. What mental age level did you arrive at?

A. Oh, I judged that he was mental age of around twelve.

Q. Mental age of around twelve?

A. Yes. Eleven or twelve.

Q. Doctor, do you believe that these fancy psychological tests like the Wechsler-Bellevue are just a lot of nonsense?

A. No; I don't.

Q. Do you make use of them in your practice?

A. Yes.

Q. When you make use of them in your practice, Doctor, do you refer that patient to a psychologist?

A. Quite often. Sometimes I give them myself.

Q. If you give them yourself, how long does it take?

A. Wechsler-Bellevue?

Q. Yes.

A. At least an hour.

Q. That is independent of your interview of the patient?

A. That is right.

Q. Independent of your history that you get from the patient?

A. That is right.

Q. Doctor, a person who has been a very active person, [fol. 533] a laborer, a person very active physically, who suddenly is faced with incarceration, where he has no exercise, no time to work, nothing to do but lay around, and is fed on a high starch and high carbohydrate diet, would he not likely gain weight; Doctor?

A. Possibly. I would think so.

Q. Over a period of five and a half years, would he not likely gain considerable weight?

A. Yes.

Q. Doctor, you said, I believe, that one of the symptomatology of manic depressive psychosis is loss of appetite?

A. In depressive phase.

Q. Do sometimes manics get to the point where they refuse to eat?

A. Not refuse to, but they are too busy to eat.



Q. You have difficulty getting them to eat?

A. No. No. They are just too distracted and too engaged in other activity to eat.

Q. I wrote down here in my notes "loss of appetite." Was that not your—

A. That was my language for depression; not in manic.

Q. If they are in depression, do they lose their appetite?

A. Yes.

[fol. 534] Q. Do they refuse to eat when they are in severe depression?

A. Sometimes, yes.

Q. Doctor, you stated a little while ago, I believe, that your average psychiatric evaluation of a patient is thirty to forty-five minutes, is that correct?

A. Yes; something like that.

Q. And at the conclusion of that 30 to 45 minutes you make a complete determination as to whether that patient needs further treatment or not, is that correct?

A. Yes.

Q. And have you ever been wrong, Doctor?

A. Many times.

Mr. Ackerly: If Your Honor will indulge me one moment to consult my associate.

Q. Doctor, you suggested that a person in a manic phase is likely to be elated?

A. Yes.

Q. Characterized by excessive psychomotor activity?

A. That is right.

Q. Would this person in a manic stage also be inclined to talk quite a bit in a stream of words?

A. That is right.

Q. Would he respond rather quickly to questions with a [fol. 535] stream of words?

A. Yes.

Q. Would he keep on going?

A. Yes.

Q. Would his answers sometimes have little relation to the question?

A. That is right. Or remote relationship to it.

Q. Pardon?

A. Or remote relationship to it.

Q. And he might go off on a tangent when he gets started?

A. Yes.

Mr. Ackerly: Your Honor, did you plan to take the recess? We did want to consult these notes.

The Court: The jury will please keep in mind the admonition.

Be back promptly at 1:45.

(Thereupon, at 12:25 p.m. a recess was taken.)

[fol. 536]

#### AFTERNOON SESSION

(The proceedings resumed at 1:45 p.m.)

The Court: Dr. Klein. Mr. Ackerly, you may proceed.

Mr. Ackerly: Thank you, Your Honor.

DR. ELMER KLEIN resumed the stand and testified further as follows:

By Mr. Ackerly:

Q. Dr. Klein, I have examined this file that you so kindly let me have before lunch and the only notes that I can find on your examination of this defendant consists of this writing on two small pieces of paper on one side only. Are there any other notes that I have missed?

A. No, that is all.

Q. This is all the medical record that you have on this patient?

A. As far as I remember, I don't believe I took any other notes.

Q. Is this the usual type of medical record that you keep for your patients, Doctor?

A. Well, in the office it is a little bit different because I have a large sheet something like you have there. But that is all I had with me at the time.

Q. And you have never transcribed these to any other sort of medical record, is that correct?

A. No, I did not.

[fol. 537] Q. I have now returned the file to you, Doctor, and I have returned your notes. Will you tell me, please,

from your notes what words the defendant was able to read during your examination?

A. I don't know. I don't remember from that.

Q. Would you like to read your notes and then tell me what words he was able to read?

A. I said I don't recall that he was able to read any words.

Q. Your testimony now is that you don't know whether he could read any words or not, is that correct?

A. No. I said I didn't put anything down in my notes to indicate what he might have read or did read.

Q. Doctor, there is a letter report in that file that you sent to Mr. Charles Irelan, who at that time was the United States Attorney. Would you read that letter and see if there is anything in that letter that refers to the fact that he defendant could read?

A. No, there is nothing to indicate that here.

Q. And, Doctor, will you look at your notes and tell me the names of the cities that he was able to recognize?

A. I have nothing on that.

Q. And on the basis of that interview, which consisted of one hour, you are willing to sit here and give your professional opinion that this man was suffering from no psychosis and no mental deficiency, is that correct?

Mr. Smithson: I object, Your Honor.

By Mr. Ackerly:

Q. How much are you getting paid to testify here today, Doctor?

A. I don't know. I haven't gone into it.

Q. You will send a bill, won't you?

A. I hope to, yes.

Q. To the government?

A. Yes.

Mr. Ackerly: No further questions.

Redirect examination.

By Mr. Smithson:

Q. Doctor, since we are talking about bills, was this an office visit or did you leave your office to examine the defendant?

A. Yes, I did.

Q. And what is your usual fee for such an examination away from your office at that time?

A. Fifty dollars.

Q. I see. You stated that is what you charged the government before, or not?

A. Yes, sir, that is right.

Q. Now, Doctor, you have been asked about this alleged recovery level from a manic depressive psychosis—

Mr. Ackerly: I object to the word "alleged." He testified there is a recovery level.

[fol. 539] The Court: Objection denied. You may answer.

By Mr. Smithson:

Q. Doctor, if a person, if the defendant on March 12 of 1953 was suffering from a manic depressive psychosis and you examined him on March 26 of 1953, fourteen days later, would there be any symptomatology present to indicate the presence of such a psychosis?

A. In all likelihood, yes.

Q. All right. Now, sir, these psychological tests, sir, would you say, Doctor, that they are the complete answer to a psychiatrist in his evaluation of a patient?

A. No, it is not. That is precisely the reason I said that—

Mr. Ackerly: Objection, he has answered the question.

The Court: The objection is overruled.

By Mr. Smithson:

Q. Would you go ahead?

A. I was going to say since the other gentleman asked me about whether or not I have all my patients examined by psychology tests, I say no, because most cases do not require a psychological evaluation. I am willing to stand by my own clinical judgment as to the presence of mental-nervous disease and as to the level of intelligence with which we are dealing in an individual.

Q. Tell me, sir, the level at which a person, the defendant in this case, might be functioning, would that be material in [fol. 540] your evaluation?

A. Specifically, how do you mean?

Q. Well, sir, whether or not he was working or had been working, as a competent brick layer?

A. Yes, of course.

Q. Did you have any record of that information given you?

A. He told me something of his work background, work history, and the very fact he was in the Armed Services was in itself an indication that he was not of a mental defective level, because the Armed Services have a definite ceiling as to their intelligence level which excludes them from enlistment or drafting.

Q. Tell me, Doctor, is anything subjective about the interpretation or evaluation of the Wechsler-Bellevue intelligence test?

A. There is a certain amount, yes.

Q. All right.

Mr. Smithson: I think that is all.

Mr. Ackerly: May I have one or two?

The Court: Yes.

#### Recross-examination.

By Mr. Ackerly:

Q. Doctor, you said that the fact that the man was in the Army was an indication to you that he attained a certain intelligence level before he was drafted?

[fol. 541] A. That is right.

Q. Now, are you sitting there and trying to suggest to us that everybody who went into the Army was subjected to a Wechsler-Bellevue I.Q. before he was drafted?

A. I can't tell you that, but they are subjected to psychological tests. I don't know whether it is Wechsler-Bellevue, it may well be some other test.

Q. As a matter of fact, probably no people who were drafted had a complete Wechsler-Bellevue I.Q.?

A. They are given a psychological examination to determine the level of their intelligence. I didn't say it was Wechsler-Bellevue, necessarily.

Q. Yes, Doctor, and is it significant to you that when they did test this man on a Wechsler-Bellevue and came out with 65, they discharged him?

A. That wasn't my understanding.

Q. Yes. Does that have any significance to you?

A. Yes, of course it has some significance, yes.

Q. And, Doctor, was it unusual, or do you think this is the only person that ever served in the Armed Services who was later found to be mentally defective and discharged?

A. Not the only one, but as a rule they are not drafted or enlisted if they have a mental defect. And I think that probably in this case we are dealing more with mental retardation than mental defect.

[fol. 542] Q. You think so, and the only basis for that is a one hour examination, is that not correct?

A. That is right.

Q. Do you know what a mental defective is, within the Durham rule?

A. I don't know that I do, within the Durham rule.

Q. So you are not in a position to say that this man is not suffering from a mental defect within the meaning of the Durham rule, are you, Doctor?

A. No, I am not.

Mr. Ackerly: No further questions.

Redirect examination.

By Mr. Smithson:

Q. Now, Doctor, the time in which this psychological evaluation, Wechsler-Bellevue, was given, was subsequent to the defendant being convicted, sir. Would that or would it not have any result on whatever tests he might have achieved—whatever result he might have achieved under that test?

Mr. Ackerly: Objection, speculative.

The Court: The objection is overruled. You may answer.

The Witness: It is very likely to have had, yes.

By Mr. Smithson:

Q. In what way, Doctor?

A. In the sense that a person would know that the psychological test was administered for purposes of either [fol. 543] incriminating him or defending him and he had



adequate intelligence in knowing it would be apt to incriminate him rather than help him.

Mr. Ackerly: Would Your Honor indulge me for a moment?

The Court: Yes, just on this last one.

Mr. Ackerly: Just on this last one.

□ Recross-examination.

By Mr. Ackerly:

Q. Maybe you didn't understand the question. This test was given after conviction, not to help him in his defense, after conviction. Do you understand that?

A. I understand that, yes.

Q. Your answer still stands?

A. Yes.

Q. And do you also understand this man was faced with a dishonorable discharge and was trying to do his best on those tests to get reinstated?

A. No, I didn't know that.

Q. Would that change your answer, Doctor?

A. Probably not.

Q. Would anything change your answer, Doctor?

A. Not in this particular question; no.

Mr. Smithson: Objection, argumentative.

The Court: The objection is sustained.

Mr. Ackerly: I think he answered, Your Honor.

[fol. 544] Mr. Smithson: The answer came out. There is no question but I think the nature of the question—

The Court: Well, let it stand.

Doctor, you may be excused.

Mr. Smithson: May the Doctor be permanently excused?

Mr. Ackerly: I think we should have him in the city, available, but he doesn't have to stay in attendance on the Court.

The Court: Doctor, is that agreeable to you?

Dr. Klein: That is agreeable, sir.

The Court: To remain in the city?

Dr. Klein: Oh, yes.

The Court: All right. This matter of putting witnesses

on call is contrary to the practices of this Court, witnesses must be here when they are called.

Mr. Ackerly: I appreciate that, Your Honor, we will take the responsibility for scheduling our program if we need him again, so it won't delay the Court.

Mr. Smithson: Dr. Kleinerman.

Thereupon—DR. MORRIS KLEINERMAN called as a witness by the government, being first duly sworn, was examined and testified as follows:

Direct examination.

[fol. 545] By Mr. Smithson:

Q. Your name, sir, is Morris Kleinerman, is that correct?

A. That is correct.

Q. You are a doctor of medicine?

A. That is right.

Q. Graduate of what school?

A. University of St. Andrews in Scotland.

Q. And when did you graduate, Doctor?

A. 1933.

Q. And since your graduation, Doctor, have you practiced in the United States?

A. I have.

Q. Have you specialized in any field?

A. I have specialized in psychiatry.

Q. In the field of psychiatry?

A. That is right.

Q. Did you receive any specialized training in that field?

A. Yes, I was on the staff at St. Elizabeth's Hospital in this city from 1934, December, until September 1947. I also took special courses at the Washington School of Psychiatry and under the auspices of the Washington-Baltimore Psycho-Analytic Institute.

Q. Have you taken any tests or qualified in any way to any specialized organization which recognizes and approves [fol. 546] psychiatrists?

A. I am a Diplomate of the American Board of Psychiatry and Neurology.

Q. What do you mean by a Diplomate of that Board, Doctor?

A. After five years' training and practice of psychiatry, I took an examination on the various aspects of the subject and passed that examination; as a result, I get this diploma.

Q. What is the American Psychiatric Association?

A. The American Psychiatric Association is the national organization of all psychiatrists in the United States.

Q. Do you bear any relation to that?

A. I am a fellow of that Association.

Q. By a fellow of that, what do you mean?

A. There are various membership categories, the first is an associate member who has had less than three years of experience in psychiatry; a full member, who has had five years' experience in psychiatry; and beyond that a fellow is one who is selected by the Organization because of perhaps some special work that he has done, some things he has written, which indicate that he has made some contributions to the place of psychiatry in this country or elsewhere.

Q. I understand you are a member of the last, is that correct, sir; you are a fellow?

[fol. 547] A. I am a fellow, that is correct.

Q. Have you ever done any teaching in the field of psychiatry?

A. Yes. From 1941 until 1948, I was on the teaching staff of the medical school of Georgetown University, starting with the grade of instructor and reaching the grade of an associate clinical professor of psychiatry. In 1948, I was appointed to the teaching staff of the medical school of George Washington University, where I am now, and my present title is that of assistant clinical professor of psychiatry. At one time, I also was a special lecturer in psychiatry at the Catholic University of America.

Q. Doctor, have you had occasion to testify in this or any other federal court as an expert in the field of psychiatry?

A. I have, many times.

Mr. Smithson: I submit, Your Honor, for the purpose of this examination, the witness is qualified.

The Court: You may proceed.

By Mr. Smithson:

Q. Doctor, directing your attention to the month of March, 1953, did you have occasion, Doctor, to examine one Willie Lee Stewart at the District of Columbia Jail?

A. Yes. I examined him at the District of Columbia Jail on March 25, 1953.

[fol. 548] Q. That date, I didn't quite hear?

A. March 25th.

Q. Thank you. Now, Doctor, the person that you examined on that date, is he present in the court today?

A. Yes, he is.

Q. Where is he, Doctor?

A. He is sitting at the far table there, the third person from my right.

Q. All right, Doctor. At the present time, how is he dressed right now?

A. He is wearing an undershirt which is showing through his jacket which is, I suppose, grey and black in color.

Mr. Smithson: May the record reflect the witness so identified the defendant?

The Court: The record will so show.

By Mr. Smithson:

Q. Now, Doctor, was there anyone with you when you performed this examination?

A. There was not.

Q. How long did your examination last?

A. Approximately two hours.

Q. And during the course of that examination, did you elicit any history from the defendant?

A. I did.

Q. When we say "history," what do you mean, Doctor, [fol. 549] as a psychiatrist?

A. The place he was born, type environment where he is raised, when he came to Washington, the extent of his education, formal education, information concerning his parents, information about who raised him, the fact that he was the oldest of three children, the type of work he did, when he was married, number of children he had, the amount of wages he was drawing, the sort of jobs he held, drinking habits, his Army period of service, history of previous conflict with the law, and what he was doing at the time that I saw him.

Q. All right, sir.

Mr. Carey: I would like to suggest that the record should reflect that in answer to that last question, the witness constantly pursued notes which are in front of him.

Mr. Smithson: I will concede the witness used the notes and the notes will be available to the defense for their examination.

Mr. Carey: That is fine, that is to eliminate any problems later on.

The Court: Very well.

By Mr. Smithson:

Q. Doctor, let's go specifically to these items of his history, if I may. Specifically, Doctor, what did the defendant tell you as to his childhood, where he was born, his parents [fol. 550] and who raised him?

A. He told me he was born in South Carolina on the 9th of August, 1922, in a rural area, was raised on a farm. He said that he didn't know of his father's whereabouts, that his mother died in 1936.

Mr. Carey: 1936?

The Witness: That is what my notes say, 1936, yes. That he was raised by a grandmother in South Carolina. That he was the oldest of three children, a boy aged 28 at the time, a girl aged 25, and he came to Washington where he had an uncle. That was the reason for coming here.

By Mr. Smithson:

Q. With regard to his schooling, what if any information did he give you on that, Doctor?

A. That he had a 4th grade education, quitting at about the age of ten.

Q. Did he give you any reason for quitting?

Mr. Ackerly: I didn't hear the age.

The Court: Age of ten.

By Mr. Smithson:

Q. Did he give you any reason for quitting school?

A. My notes do not indicate any reason.

Q. Now, did you inquire, Doctor, as to the defendant's marital status?

A. Yes. He told me that he was married the 8th of January, 1946. He thought his wife was aged 25. They were [fol. 551] married by a Baptist preacher, that there were four children, a boy aged six, a girl aged four, a girl aged three, and a girl aged sixteen months, and another child was on the way. He says he gets along fairly well with his wife, but has occasional quarrels. He says that they lived in one room because it is pretty hard to get a place with all these kids. He told me he was paying eight dollars a week for his room.

Q. Doctor, did he describe or give you any indication, any history of what his work was as of the time, shall we say, immediately preceding his arrest, or what his work had been in the past?

A. Yes, he told me that he was engaged essentially in construction work, that he had worked as a plumber's helper; has done some plastering, some carpentering, was generally a handyman around the construction trade.

Q. Did he give you any indication what his salary was for any of this period of time?

A. He says he averages \$49-\$50 a week, when he works.

Q. Did you make any examinations or tests of the defendant regarding his ability to read or write?

A. Yes.

Q. Would you describe what tests you gave him?

A. First of all, I asked him to write his name, which I have right here; asked him to write down certain numbers, [fol. 552] and I asked him how much seven times nine is, and asked him to write the answer on this paper, which he did, correctly, as sixty-three.

Q. Did you give him any other tests or amplify the reading or writing or arithmetic test at that time?

A. Yes. Since he came from South Carolina and said he had been raised there, I asked him what the state capital was, and it is somewhere here—he told me correctly that the state capital of South Carolina was Columbia. Multiplied seven times two correctly, added seven plus two correctly, could differentiate those two questions, that one was addition, one was multiplication. I asked him his street address where he lived and he gave me his address as 415 A Street, N. E., which I believe was his address at that time.



Q. All right, sir. Now, did he say, sir, whether or not he had been working immediately prior to his arrest?

A. He told me that he hadn't had a steady job for the past two months, that he had been doing odd jobs such as washing windows during that period of time.

Q. Did he say anything with regard to his habit of drinking or not drinking?

A. He said that he drinks only on weekends, usually beer, very seldom drinks whiskey. He couldn't remember when he had had his first drink, and that is about all about his drinking habits.

[fol. 553] Q. Did you conduct any examination of the defendant, ask him any questions with regard to his knowledge of the city, Washington, D. C.?

A. Well, I asked him where he lived and, generally, where he was located at the time the examination was being conducted and what sort of place it was, and that sort of thing.

Q. What were his answers, sir?

A. His answers were quite correct, the fact that he knew he was in D. C. Jail, he knew what type of place he was, and he had an idea of what he was there for; in other words, how he got there.

Q. All right, sir. Did he express to you whether or not he had any knowledge of the offense with which he was charged?

A. He told me as follows: That he was accused of two stick-ups and killing a man, but at the time it happened he said he was at home. He doesn't know why he is being so accused and said that he read about it in the paper.

Q. Now, Doctor, going to the history which you have related—that part of it which you have related to us, was there found by you any reluctance on the part of the defendant to answer your questions?

A. No, there was no reluctance. I have noted here that he was alert and cooperative.

[fol. 554] Q. Doctor, did you find any mental disease present in the defendant as a result of your two-hour examination?

A. In my opinion, there was no presence of any disease.

Q. Would that opinion, sir, likewise—let me ask you this: Then, sir, your examination was the 25th of March, is that correct?

A. That is correct.

Q. Then, sir, what would be your opinion as of March 12th of 1953, based on your examination of the defendant on the 25th of March of 1953, ~~was there or was there not present any disease, mental disease in the defendant at that time?~~

A. I do not believe there could have been any present at that time.

Q. All right, sir. Now, Doctor, are you familiar with what is known as manic depressive psychosis?

A. I am.

Q. Now, is that one of the major psychoses, Doctor?

A. That is.

Q. Tell me, Doctor, has there been much written about it, is it a well-known psychosis or is it a hidden matter?

A. It is well known.

Q. Would you say, sir, it was of recent origin or has it [fol. 555] been discussed in medical psychiatric books for any number of years?

A. It has been discussed for many, many years.

Q. Now, Doctor, with regard to the manifestations of manic depressive psychosis, did you see any manifestation of such a mental disease in the defendant?

A. I did not.

Q. Now, this was as of March 25th of 1953?

A. (Nodding head)

Q. Then, sir, what is your opinion as to the presence or absence of any such manifestation as of March 12th of 1953?

A. I would say that it was not present on that date.

Q. Now, Doctor, the question of schizo-affective psychosis, what is that, sir; is that a form of schizophrenia or not?

A. Well, it is usually classified among schizophrenias—

Mr. Carey: It is what?

The Witness: It is usually classified among the schizophrenias, schizo-affective psychosis, but there are also symptoms of affective psychosis, too, as well as symptoms of schizophrenia; that is why you have the combined name.

By Mr. Smithson:

Q. Is that the same thing as manic depressive?

[fol. 556] A. It is not the same thing as manic depressive psychosis.

Q. Did you find on March 25th, 1953, present any symptomatology, any evidence of schizo-affective psychosis in the defendant?

A. I could see none.

Q. Then, what would be your opinion as of March 12, 1953, as to the presence or absence of schizo-affective psychosis in the defendant?

A. I don't believe that was present.

Mr. Smithson: Would Your Honor indulge me, I want to get a reference to the Wechsler-Bellevue.

The Court: Yes.

By Mr. Smithson:

Q. Doctor, are you acquainted with what is known as a Wechsler-Bellevue intelligence quotient test?

A. I am.

Q. Tell me, Doctor, is it in one or more parts?

A. It is more than one part.

Q. Is there a part known as the vocal sub-test?

A. Verbal.

Q. Verbal, I am sorry. Verbal sub-test, I beg your pardon. Tell me, sir, this verbal sub-test, does the level of education play any part in the evaluation of the result of such a verbal sub-test?

[fol. 557] A. I think so.

Q. Now, sir, is there a performance sub-test?

A. Yes, there is.

Q. In the overall evaluation of the result of the combination of the two, sir, does that likewise play a portion in the evaluation of the intelligence quotient of that person?

A. Yes, you usually consider both to get any final result.

Q. All right, Doctor. Now, Doctor, assuming that the defendant Willie Lee Stewart in 1946, 1946, following a conviction against the defendant Willie Lee Stewart in a court martial proceeding after he reenlisted in the service, for assault to do bodily harm on another soldier, following that conviction, a psychologist gave him these examinations, the Wechsler-Bellevue verbal and performance sub-test and that the defendant achieved on the verbal sub-test a score of 63 and on the performance sub-test a score of 76, and that it was evaluated at a total score of 65 on that test, Doctor,

does that determine the defendant to be or not to be a mental defective?

A. Well, assuming that score is correct, anybody——

Mr. Carey: I am going to suggest the Doctor answer the question "Yes" or "No." He has started into an explanation without answering the question.

Mr. Smithson: Can you answer, as I put it to you?

[fol. 558] The Court: If you can answer it briefly and then explain, Doctor.

The Witness: Would you ask the question again, please?

Mr. Smithson: Maybe I had better rephrase the question.

The Court: Yes.

By Mr. Smithson:

Q. Doctor, assuming that the defendant Willie Lee Stewart in 1946, following his conviction for assault to do bodily harm and which occurred on his second enlistment in the Service, to another soldier, following that conviction he was given a psychological test, a verbal sub-test under Wechsler-Bellevue and a performance sub-test, achieving 63 on the verbal, 76 on the performance, and arrived at a total, according to that psychologist, of 65, sir; would that in and of itself, in your mind, determine the defendant to be a mental defective?

A. No.

Q. Now, Doctor, would his educational level on that test have played any part in his result of 63?

A. The verbal part would be affected by his educational achievements.

Q. All right, sir. What if anything do you gain from the 76 which he achieved on the performance?

A. The 76 indicates native endowment.

[fol. 559] Mr. Carey: What?

The Witness: Native endowment, and this is more nearly his potential than the other, which depends greatly on his educational achievements.

By Mr. Smithson:

Q. All right, Doctor. Now, Doctor, on your examination of him—strike that.

Tell me, Doctor, would a psychological report or does a psychological report supply the complete answer to a psychiatrist on the intelligence quotient of a patient?

A. It does not.

Q. Does your own examination play any part in that?

A. It plays a major part.

Q. All right, sir. Well, for one thing, sir, is a psychologist the same as a psychiatrist?

A. He is not.

Q. All right, sir. Is he a doctor of medicine?

A. He is not.

Q. What would your opinion, Doctor, be as to the mental level on March 12th of 1953, based on your examination of March 25th of 1953, of the defendant Willie Lee Stewart?

A. I would have classed him as being within the average normal range of intelligence.

Q. All right, Doctor. Now, Doctor, there is a line of demarcation at 70, is there not?

A. Yes.

[fol. 560] Q. Now, is that line of demarcation infallible, Doctor, or not?

Mr. Ackerly: Objection, the 70 is on the combined scale; the combined scale weights the 76 and the 63 and I don't think that was in the question. I think the Doctor will concede that is correct.

The Court: The objection is overruled. Answer the question.

The Witness: What was the question?

By Mr. Smithson:

Q. Doctor, there is a line of demarcation on the weighted average at 70, is there not?

A. I don't quite understand.

Q. On the Wechsler-Bellevue scale?

A. That is a level that is used for certain purposes for that scale.

Q. Doctor, is that infallible, that level?

A. I don't believe so.

Q. All right.

Mr. Carey: That is your professional experience?

The Witness: I base it on my experience.

The Court: One at a time, gentlemen, you will have your cross-examination.

By Mr. Smithson:

Q. Doctor, at the time you saw the defendant Willie Lee Stewart on March 25th of 1953, do you have an opinion, Doctor, as of March 12th of 1953, whether or not the defendant [fol. 561] understood the difference between right and wrong?

Mr. Carey: Objection.

The Court: The objection is overruled.

The Witness: I believe he did.

By Mr. Smithson:

Q. All right, Doctor. Now, do you have an opinion, Doctor, as of the date of March 12th of 1953, based on your examination, whether or not the defendant could, recognizing the difference between right and wrong, embrace the right and reject the wrong?

Mr. Carey: Objection.

The Court: The objection is overruled.

The Witness: I believe he could.

Mr. Smithson: All right. I believe that is all at this time.

The Court: Cross-examine.

Cross-examination.

By Mr. Carey:

Q. Dr. Kleinerman, how long did you examine this man, did you say, the first time you saw him?

A. For about two hours.

Q. Two hours. That is the only time you spent in examining this defendant, is that correct?

A. That is correct.

Q. Now, you have had occasion in your psychiatric experience to have analyzed many people, is that correct?

[fol. 562] A. Yes, that is correct.

Q. Ordinarily, when you have a patient in your office, how long a time is consumed by you in determining whether a patient is of sound or unsound mind?



A. That varies with the individual patient. Some patients, I could tell in a few minutes simply by observing their behavior and their speech and what they are saying and doing. Some may take much longer.

Q. In a close case, it takes some little time, is that correct?

A. Might I ask what you mean by a close case?

Q. Where the imbalance is very minute.

A. I would grant that, yes.

Q. Now, where the imbalance is very minute, how long a time would it take you to draw a conclusion, professionally, as to the soundness or unsoundness of the mind of the patient?

A. I believe, it has been my experience that I have been able to reach some conclusion, a valid conclusion, in my opinion, within an hour or two.

Q. Would you say most patients that come to your office, you are able to conclude within an hour whether that patient is sound or unsound in his mentality?

A. I think so.

Q. How long does it take you to take the history of the patient?

[fol. 563] A. That also varies.

Q. What do you consume, or what do you consider basic information as far as the history of the patient is concerned?

A. Family history, past personal history and development and history of his present situation.

Q. Family history, what does that consist of?

A. His father, mother, what happened to his brothers and sisters.

Q. You ask, who is your father, is that correct?

A. That may be, but I ask more——

Q. Do you ask what——

Mr. Smithson: Counsel, please.

Mr. Carey: I have no desire to interrupt you.

The Witness: I ask more about the father than who he is.

By Mr. Carey:

Q. What is that?

A. I ask what sort of person the father is.

Q. You ask about the father's personal characteristics?

A. Whether or not he has ever had any mental illness or mental problems.

Q. That question isn't answered with a "Yes" or "No" answer, is it?

A. Sometimes it is.

Q. Ordinarily not?

[fol. 564] A. It depends upon the patient.

Q. What do you ask about the characteristics?

A. First, whether his father is alive or dead.

Q. Right. Next?

A. If dead, what was the cause of his death.

Q. Right. Next?

A. Whether or not the father ever had any mental illness or things of that nature.

Q. If the patient says "Yes," then what?

A. What sort of mental illness, was he hospitalized for it, and so forth.

Q. Do you ask what type of illness it was?

A. As far as the patient may know.

Q. Then what else do you ask about the paternal parent?

A. Well, that is about all there, what sort of person the patient thinks he was.

Q. Then I presume you ask about the mother?

A. That is right.

Q. You go right down the line, A, B, C, D, E, F, G, is that correct?

A. Yes.

Q. And I presume you are making notes all the time you are asking these questions, is that correct?

A. Usually.

[fol. 565] Q. Then who else do you ask about, other than the mother or father?

A. Sisters and brothers.

Q. And it depends on the number of persons in the family as to the number of questions you have to ask, is that correct?

A. That is correct.

Q. And each person whom they identify, you go down the line, A, B, C, D and E, is that correct?

A. Yes.

Q. When you get through with the sisters and brothers, whom do you ask about then?

A. Where the patient was born, how much schooling he had, when he left school, try to determine for what reason, what sort of work he did or what he did.

Q. And these questions aren't answered by "Yes" or "No." If you say, did you go to school, he may say, "6th Grade." You would say, why did you leave the 6th Grade, is that correct?

A. Certainly.

Q. It is a chain reaction, one question leads to another, to another, to another?

A. That is right.

Q. That is right, so this thing becomes almost interminable, does it not?

[fol. 566] A. No, because I judge the importance of each situation in my mind, whether it is worth pursuing further.

Q. All right. You get through with sisters and brothers. What else do you ask?

A. For instance, work history.

Q. Where he has worked, what he has done, whether he is still employed, has he been fired, why was he fired, how did he get along with his associates, all of those questions: is that correct?

A. (Nodding head)

Q. Then you ask him about his symptoms, what is bothering him?

A. No. Before that, I ask him whether he has been in Service, the Army or Navy, was he drafted, enlisted, how high did he get and what difficulties—

Q. So this requires a series of question after question after question, does it not?

A. It certainly does.

Q. And it takes some little time to get that; this is one facet of a mental examination, isn't it?

A. That is right.

Q. The history itself. Now, what else do you ask the patient himself about his own personal idiosyncrasies, if any exist?

A. First, I observe the patient, his movements, his appearance, his mood, his facial expression, whether his thinking seems to be disconnected or whether it is incoherent or irrelevant or not.

Q. All right. Now, we have achieved the historical background of the patient, we have achieved some personal history of the patient; what else do you do, Doctor?

A. His orientation.

Q. Orientation, what do you mean by that?

A. Orientation of place, person, time; whether he knows the date, that is orientation for time.

Q. Maybe I can help myself and the jury. When you say orientation, when you ask about place, do you ask the patient does he know where he is at the present time?

A. That is right.

Q. And do you ask him what time of day it is?

A. Approximately.

Q. You ask him what day it is?

A. The month, year, and so forth.

Q. That is what you mean by orientation?

A. Yes.

Q. That takes a little time, doesn't it? All right, tell us what you do next.

A. And then I check his memory.

Q. What do you ask him about, give us a general idea what you ask him?

[fol. 568] A. First of all, when I came in, I, in this case, introduced myself to the person I was about to examine, gave him my name distinctly, and after awhile checked to see whether he remembered my name and the purpose for which I was there. This would be a test of his memory. Also, I gave him certain numbers to remember.

Q. I am talking about the ordinary patient, is this the way you do with them all?

A. I do with each patient as I feel is indicated.

Q. If I go into you as a private patient, it is presumed I know who you are, is that correct; you don't have to tell me, do you? If I go into your office, wherever it is located in the District of Columbia, I know I am going to Dr. Kleiner-man, isn't that correct? Why would you tell the patient your name, if he is already there and he knows who you are?

A. Because I have always found it helpful to introduce myself to every new patient to make the patient feel at ease and realize that I am trying to help him, obviously. I want to get to know him, I want him to know me, too.

Q. What next do you do, Doctor?

A. Then I attempt to determine the presence or absence of unusual symptoms, such as hallucinations, delusions, ideas of reference, and such.

Q. Now, absent hallucinations, absent delusions—  
[fol. 569] A. I said presence or absence.

Q. I am saying, absence, absent hallucinations, absent delusions, and with only the historical background of the patient provided you by the patient, are you able to make an analysis as to whether that person is of sound or unsound mind?

A. You seem to overlook the fact I also do a mental examination of this patient.

Q. What was the mental examination?

A. Determining whether or not he has or has had these type of symptoms.

Q. What was the mental examination you gave?

A. Asked whether he had any unusual experiences, whether he has ever heard voices, how people treat him, and things of that nature.

Q. Absent hallucinations or delusions, can you say whether a person is of sound or unsound mind?

A. I don't know what you mean by absent, absent is something that doesn't exist, in my mind.

Q. Must a mental patient always have to have hallucinations?

A. No.

Q. Must a mental patient always have to have delusions of grandeur?

A. No.

[fol. 570] Q. Well, what are the other facets which would be present which would indicate a person is mentally unsound, other than historical background?

A. Distortion of thinking, by his giving irrelevant answers or incoherent answers to questions.

Q. What distortion of thinking are you thinking of?

A. For instance, for example, you ask him how he is feeling and he says, "My mother is fine." That is an irrelevant answer, his mother may be fine but it has nothing to do with the question at hand.

Q. An unrelated answer to a specific question, is that what you mean?

A. (Nodding head)

Q. What else do you do during the time a patient is in your office, in order for you to make your analysis?

A. After determining his history and his mental status,

I do nothing except decide what form of treatment or what would be able to help this patient.

Q. And you can make this conclusion within a period of one hour, is that correct?

A. I can.

Q. Never having seen the patient before?

A. Yes, based upon my experience in handling these patients.

Q. Never having talked to the patient before?

[fol. 571] A. That is right.

Q. Now, do you rely on the history of a patient presented to you by the patient himself?

A. In certain cases, I do; where the patient is able to give, in my opinion, what is an adequate history.

Q. Generally, has it been your experience that the historical background is provided by the patient or by someone in the family?

A. It varies with the individual case. In the greater number of cases, the patient has been able to give me the history.

Q. Which would you consider a more accurate source, in order for you to make a proper analysis, an historical background provided by the patient who may be of unsound mind or one of the family?

A. For my purpose, I think the patient, because the patient can better tell me how he feels than anybody else can tell me.

Q. I am talking about the historical background, if this patient is suffering from disorientation, he is suffering from hallucinations, has delusions of grandeur, can you rely on an accurate picture of that person's background?

A. It is possible that such patients can give me an accurate history and I have to determine each individual case separately.

[fol. 572] Q. Would it be more accurate to secure that historic background from somebody who knows the patient, who is not of unsound mind?

A. Not necessarily.

Q. Doctor, there is no way for you to check the accuracy or inaccuracy of an historical background of a patient given by that patient, if that information is inaccurate, is there? Assume a patient walks into your office, he is there



for a mental examination; further assume that patient is the only one who has ever talked to you about himself. He gives you an inaccurate background about his historical background. Wouldn't that provide you or persuade you to reach an improper conclusion based on improper facts?

A. Well, now, that is where I——

Q. Suppose I——

Mr. Smithson: Let him answer.

The Witness: That is where I think my experience comes in, I have to judge whether the information appears to me to be inaccurate because usually I can pick up contradictions in history and then I question the patient further.

By Mr. Carey:

Q. Suppose Willie Lee Stewart had told you he was a college graduate. In trying to arrive at a proper analysis and reach a proper conclusion, you would have had to assume that this man was a college graduate, would you not?

[fol. 573] A. That thought didn't enter my mind, because Willie Lee Stewart did not tell me he was a college graduate.

Q. I am talking about a mythical character who goes into your office and says to you, "I am a college graduate, I went to Harvard University, I was top man in my class," and I never went beyond the third grade. In making your analysis, you would have to assume that this man was telling the truth, that he was a Harvard graduate, and you would then be persuaded to reach an improper conclusion, isn't that correct?

A. I don't agree with that.

Q. Why don't you agree with it?

A. Because in your statement you were saying the man went to Harvard University and didn't go further than the third grade and this is the statement he told me.

Q. I say, Doctor, I am a Harvard graduate, but if the real fact is known, I was born in a small mining town and never got beyond the third grade. How would you know the difference?

A. I think I could spot a Harvard graduate.

Q. Well, let's take somebody who is not Ivy League, somebody who speaks with not the broad "a" but somebody

who uses the mid-West twang, we will say he went to Purdue University. How would you be able to spot whether he was a graduate of Purdue or Peter Cook High School in some mid-Western State?

[fol. 574] A. Well, first of all, a person who goes to college, I believe, or a university, has some indications in the way he handles himself, the way he speaks, in his interests, and this gives me the lead as to whether or not he is telling me a fib, shall we say, or is trying to impress me or just telling a bold-faced lie.

Q. Well, Doctor, in your experience, a man forty years or so, I should imagine, haven't you found smooth, suave confidence men who never went beyond high school, who could pass for being a college graduate?

A. No, I am afraid they haven't, they might have said they were college graduates but I had a reservation in my mind.

Q. Ponzi, a slick salesman from Boston, Massachusetts, has never been able to persuade you he was a college graduate, is that correct?

A. I never knew him.

Q. He was one of the slickest con men in the United States. Would he be able to deceive you, Doctor?

A. I could hardly answer that question, he never tried to.

Q. Do you know a man by the name of John L. Lewis, President of the United Mine Workers of America?

A. I have read of his name in the paper, I do not know him.

[fol. 575] Q. Do you know he was born in Iowa and never went beyond the fourth or fifth grade?

A. I did not know this.

Q. If John L. Lewis came in to you and he told you he was a college graduate, would you be able to spot him as a faker, as far as his educational background was concerned?

A. If he told me he were a college graduate and in fact he weren't, I don't know John L. Lewis, I can't say whether this is so or not so, I think I would be able to spot it.

Q. You know he is considered a master of the King's English?

A. I understand he speaks very well.

Q. Would that be one of the indicia of the collegiate background, the ability to speak well.

A. That is only one of the indicia.

Q. What is the most important index as to one's educational background, in your opinion?

A. Knowledge.

Q. What knowledge do you acquire from a patient in a period of one hour, when you ask 50 to 75 to 100 questions? Do you ask them to solve an algebraic problem?

A. Ordinarily no, occasionally I might.

Q. Do you ask them to explain the Euclidean theory?

A. Ordinarily, no.

[fol. 576] Q. What do you ask which would provide you with information that this man, other than having the ability to speak English with the finest, has a fine background in other fields other than English?

A. What I attempt to do is to find out something about his background first and try to discover whether he is indicating that he has some experience and background where I have also had experience, then I try to discuss that with him.

Q. Well, suppose you had this fine master of the English language and that would not indicate to you that this man, uh-huh, is telling me the truth when he says he is a graduate of a university?

A. Who are you talking about now? John L. Lewis?

Q. Well, take Mr. X, who is a fine, outstanding speaker.

The Court: Who is that?

Mr. Carey: Mr. X.

The Court: Oh.

The Witness: Well, frankly, I never met Mr. X, so I couldn't tell you about him.

By Mr. Carey:

Q. You said you never met Mr. Lewis, but you said you could spot his background.

A. I said I couldn't—

Q. Mr. X means as much to you as Mr. Lewis—

[fol. 577] Mr. Smithson: May the witness be allowed to answer one question at a time?

The Court: Yes, allow him to answer the question.

Mr. Carey: Give him all day, Your Honor, I am an easy fellow to get along with.

The Witness: A patient coming to me, I can usually decide in my own mind whether the educational level which he claims to have, is true in fact.

By Mr. Carey:

Q. Well, I must assume this man comes to you, he is a master of the King's English, he has applied himself assiduously outside of school, he speaks the finest English and he says to you, "I have a master's degree from the University of Chicago." Then you would try to concentrate on English because that is his field, would you not?

A. Perhaps.

Q. Would not that deceive you in your analysis?

A. No, because if I had any question, I would really avoid discussing the field that he claims to be proficient in, because I would know he would be proficient; I would try other fields where he might not be so proficient.

Q. So if you had a man who had gone to the University of Chicago, concentrated exclusively on English, ignored the other academic fields, then according to your reasoning, would you not then conclude, because this man was an authority on English but knew nothing about anything else, [fol. 578] that he must be a faker?

A. No, because in order to get through the University of Chicago, in addition to passing English courses, he must have passed the required courses, history, mathematics, science and such, he would have some knowledge—

Q. You have mis-stated my facts. I said this man devoted himself exclusively to English, ignored the other academic fields. Now, will you answer the question at this time?

The Court: He has answered the question. Put a new question.

Mr. Carey: But, Your Honor, he added facts that I didn't. All right, Your Honor.

The Court: You stated that he ignored your question, but he has answered it.

Mr. Carey: I am ignored often, I don't mind.

The Court: Let's have a new question.

By Mr. Carey:

Q. What is a man's intelligence quotient, what does his I.Q. have to do with the absence or presence of a mental disease or a mental defect?

A. His I.Q. would indicate, not the presence or absence of mental disease, because a person may have a mental disease and everybody has an I.Q.; whether or not they have a mental disease or defect, they have an I.Q.

Q. Well, is there any point, in your opinion, where a low [fol. 579] I.Q. would indicate the presence of a mental disease or a mental defect?

A. Well, if I may put it this way—

Q. Put it any way you wish.

A. I.Q.'s below 70 are considered to be signs of mental deficiency.

Q. Signs of mental deficiency?

A. Yes.

Q. Right. Now, continue.

A. All below that are mentally defective.

Q. He is a mental defect. So an I.Q. lower than 70, in your professional opinion, makes that person a mental defect?

A. According to the present standards, yes.

Q. And you adopt those present standards in your professional work, do you not?

A. That is correct.

Q. What is a mental defect?

A. A person who is said to have mental deficiency when they cannot adjust to life and its problems in an average, normal way.

Q. So a mental defective, in your book, in your professional opinion, is one who cannot adjust himself to a society, is that correct?

A. Not entirely correct, no.

[fol. 580] Q. Well, say it again, I probably misunderstood you.

A. Cannot adjust to his environment, he may well adjust to society but he may not be able to learn a trade, for instance.

Q. How do you differentiate between environment and society?

A. Society is part of the environment, certainly, the environment in which he finds himself.

Q. Are you suggesting environment is larger than society and society is part of the whole and not the whole?

A. Society consists essentially of people; there are physical elements in environment, too.

Q. Aren't society and environment synonymous terms?

A. I don't believe so.

Q. What else is a mental defect other than one who has difficulty in adjusting to his environment?

A. That is all he is. Adjusting in an average, normal way, I said; some adjust to a certain degree, some to a greater degree than others.

Q. In other words, it is your opinion that a mental defective is unable to adjust himself to environment and, consequently, is not responsible for his failure to adjust?

A. No. I said in an average, normal way.

Q. Well, what is the control or the governor which keeps that man from adjusting to environment?

[fol. 581] A. May be lack of training opportunity, may be lack of supervision.

Q. Well, I.Q.'s aren't determined by supervision, are they?

A. No, but the I.Q. may not be utilized to full extent without proper training.

Q. Is it not true that an intelligence quotient is basic and it doesn't improve much at all during a lifetime?

A. Well, I wouldn't quite agree with that, but the potential is the same.

Q. Isn't that generally true? In other words, when I was in high school, I took an intelligence quotient test. As I understand, the professional field to which you have succeeded, believes that your intelligence quotient which you have in high school does not vary to any degree of significance between high school and college and graduate school training?

A. Start at the end of the high school level, yes.

Q. My I.Q. today is the same as it was a few years ago, right?

A. Yes.

Q. So, how do you suggest that an I.Q. makes any substantial adjustment of any kind?



A. After all, with your I.Q., you have had additional experience which has helped you adjust.

[fol. 582] Q. But it has not increased my intelligence quotient?

A. No, it has not, but it has helped you to use what you have.

Q. But you told me and the jury that if you have an intelligence quotient of less than 70, you are a mental defective.

A. I said that the accepted classification now indicates that a person with an I.Q. of 70 or less—less than 70, actually—70 is the line of demarcation, is classified as a mental defective, that is correct. However, I would not accept anybody's test. I want to know what test was done. There are many tests to determine the I.Q.—

Q. Doctor, I am—

Mr. Smithson: Wait a minute.

Mr. Carey: Excuse me. When I interrupt, you put your hand up, I will stop.

The Witness: And I would like to know the test and I want to know who is giving this test, whether this person is competent to give the test, whether the person is sufficiently experienced to give the test. And then, assuming the test is valid, then I would say that the 70 level, which is the line of demarcation, 70 or above is considered normal, below 70 is considered mental defective.

The Court: We will take a ten-minute recess. The jury will keep in mind the admonition.

(A short recess was taken.)

[fol. 583]

#### AFTER RECESS

(The Court reconvened at 3:13 p.m.)

Dr. MORRIS KLEINERMAN, resumed the Witness Stand.

Cross-examination.

By Mr. Carey, continued:

The Court: Mr. Carey, you may proceed.

Mr. Carey: Thank you, Your Honor.

The Court: I will have to go back to my chambers a minute. Excuse me, please.

(The Court left the courtroom, and returned at 3:28 p.m.)

The Court: Mr. Carey, you may take the witness.

Mr. Carey: Thank you, Your Honor.

By Mr. Carey:

Q. Doctor, you are born with an intelligence quotient, aren't you?

A. No; an intelligence quotient is something that is determined by tests. You are born with——

Q. I mean your intelligence—I'm sorry. You were born with a certain percentage of intelligence?

A. You are born with a certain potential intelligence.

Q. And so, if a man is fortunate enough to be born with a high potential of intelligence, it is not his fault, is it?

A. No, he is not responsible for his heredity, if that's what you mean.

[fol. 584] Q. Well, if a man is born with a limited potential, it is not his fault either?

A. That's correct.

Q. So, if you and I happen to be professional men, we were born with a certain intelligence potential, were we not?

A. That's correct.

Q. So we can't take credit for our intelligence quotient, can we?

A. We can't take credit——

Q. Generally speaking, I mean——

A. I'm sorry——

Q. We can't take credit for our potential, because we have no role in determining that. However, we are responsible for developing to our full potential, and that resultant development is caused by proper home training?

A. That would be one factor.

Q. Proper schooling?

A. That is also a factor.

Q. Proper clothing?

A. Clothing, I don't know; but certainly there are many factors involved.

Q. I mean if you are fortunate enough to be born in the lush farm fields of a certain area where they had good schools, good family upbringing, stern parents, work available, [fol. 585] those things all enter into your intelligence quotient, do they not?

A. Another thing that enters into it is motivation. Take Abraham Lincoln. He didn't have schools available. He didn't have property available, he didn't have clothes available, yet he developed himself to his full potential.

Q. That's right. But motivation is something you are born with; it is not acquired, isn't that correct?

A. No, not entirely; some of it is acquired.

Q. But some of it you were born with?

A. I would question that.

Q. What is responsible for motivation?

A. A desire, a sufficient desire, to achieve something, and this desire is generated in the individual by identifying themselves with another person who has achieved something, or realizing that they, too, could become well-educated, we'll say, or well qualified in certain spheres, if they would only put their effort to it.

Q. And motivation is generated by good family surroundings; if you have a fine mother and a fine father, you are apt to have a better motivation than one who was reared in a tough environment, isn't that true?

A. You are apt to, but this does not rule it out entirely.

[fol. 586] Q. I know that, but I'm speaking generally, Doctor. I know we can't specify every situation, but, generally, your motivation is engendered or helped by a fine family atmosphere, isn't it?

A. I would say that, yes.

Mr. Carey: Excuse me a moment, your Honor.

The Court: Yes.

Q. Doctor, what effect would motivation have on one who is a mental defective?

A. A great effect. Properly motivated, a person who is classified psychologically on the basis of I.Q. in the mental defective range, assuming he were what we call a high grade moron, that is, between 60 and 69, approximately, motivation would be the thing that would help that person overcome many of his handicaps.

Q. But motivation could not exceed his intelligence potential, could it?

A. His achievements could not.

Q. In other words, you were born with a certain intelligence potential. We'll place this as an arbitrary ceiling—

(Indicating)

Looking at my hand there, if I have a certain intelligence potential, no matter how great my motivation, I can't get beyond that because my intelligence quotient won't allow me, isn't that correct.

[fol. 587] A. No, but you can make the maximum use of your potential.

Q. That's right. But utilizing the maximum, I can't get beyond this ceiling, because that's my potential?

A. That's correct.

Q. So if I'm born with an I.Q. of 67, that's my intelligence ceiling: I can work like a dog from the day I was born, work as hard as one can, I can never get beyond this ceiling, could I?

A. But nobody is born with an I.Q. of 67; this is discovered as they develop, and one can hardly decide at birth—

Q. What do you mean, one is not born with—

Mr. Smithson: Let the witness answer.

Mr. Carey: I'm sorry.

The Witness: They are born with an intelligence potential. You can test, even at high school, by the time of high school, the intelligence I.Q. should be fixed, but below that, there are increases in I.Q. as we go through the primary grades.

Q. You are not suggesting that one can achieve an I.Q. of 140 just by motivation alone?

A. I didn't say that.

Q. What did you say?

A. I said that as a child, we don't know the final potential [fol. 588] of that individual, and——

Q. When does that potential——

Mr. Smithson: Please let the witness finish.

The Court: Let him finish.

Mr. Carey: I'm sorry.

The Witness: If we test a child in the first grade, we might find that they have an I.Q. of 65. However, if we send that child to a proper school, and with proper teaching, we find by the time that child reaches the third or fourth grade, that I.Q. has risen to 70.

Q. That's correct. What I'm asking you: Is it not true that one has an intelligence potential which can only be achieved and not exceeded?

A. That is correct.

Q. That's correct. So if one's intelligence potential is 67, when he's seventeen years old or twenty years of age, no matter how much harder he worked, motivation or what have you, would not allow him to go beyond that 67, isn't that correct?

A. Might I ask a question of what you mean by that?

Mr. Carey: I'm glad to answer if the prosecutor doesn't object.

The Court: He wants to understand the question.

The Witness: Do you mean that he won't score any more on the written tests that he's taking?

[fol. 589] By Mr. Carey:

Q. What I am trying to say is this: You have testified that one has an intelligence potential, isn't that true?

A. That is correct.

Q. And my last question to you was this? No matter how hard one works, one cannot exceed that potential. One can achieve it, but no one can exceed it?

A. I would agree with that.

Q. Yes. So I say if one's intelligence potential is 67, come hell or high water, no matter how hard that citizen works, he cannot exceed 67, because that's the limitation of his potential?

A. Yes, but not all people with 67 achieve the same thing,

because some are more highly motivated and use their potential to the maximum, while others—

Q. That's correct. But then you have to have all accompanying pleasant situations surrounding one, isn't that true?

A. It might be a reaction to a poor situation; a desire to get out of a poor situation.

Q. That's right; but he still can't get beyond that 67?

A. On a test, that's right.

Q. That's what I'm trying to suggest. Now, Doctor, you are familiar with David Wechsler, quite an authority on [fol. 590] adult intelligence?

A. He is one of the authorities.

Q. Yes. Well, would you consider him one of the outstanding authorities?

A. He's one of the best known authorities.

Q. Would you say that he is one of the best?

A. I would say that he is a well known authority.

Q. Would you say that he is competent?

A. I would say that, yes.

Q. I am going to read to you from a book identified: "The Measurement and Appraisal of Adult Intelligence," Fourth Edition; the author is one, David Wechsler, Chief Psychologist, Bellevue Psychiatric Hospital, Adjunct Professor of Psychology, Graduate School of Arts and Science, New York University, Clinical Professor of Clinical Psychology, New York University College of Medicine; and this book was issued in 1958. I would like to have you listen to this which I am about to read, and when I conclude reading, I shall ask you whether you agree or disagree. This is on Page 50, it is the second paragraph:

(Reading) Mental Deficiency. Unlike typhoid fever, general paresis is not a disease. A mental defective is not a person who suffers from a specific disease process, but one who, by reason or intellectual arrest or impairment, is unable to cope with his environment, to the extent that he needs special care, education, and [fol. 591] institutionalization. A mental defective is characterized, not only by a lack of ability to care for himself, but also by an incapacity to use effectively the abilities he does have. His actions are not only sense-



less and inadequate, but perverse and anti-social as well. He may not only be stupid, but vicious, and the question arises why he is sometimes one and not the other.

Now, do you agree with that?

A. I do not. May I see the book, so I can see the contents?

Q. Yes, indeed.

A. Because I do not think, and I will tell you why I disagree—

Q. Let's approach it positively—

Mr. Smithson: If the Court please, the witness started to make an answer, may he be allowed to finish.

Mr. Carey: I think I could suggest whether he approach it positively or negatively.

The Witness: I do not agree with that statement.

By Mr. Carey:

Q. What is wrong with it, Doctor?

A. I do not agree that because a person is a mental defective that this person lacks ability to care for himself. Many, many mental defectives care for themselves in very adequate fashion.

[fol. 592] I do not agree with the statement that there is an incapacity to use effectively the ability he does have.

(Reading)

Many mental defectives do use their abilities quite successfully and quite productively. This statement, "He may not only be stupid but vicious," is another thing I cannot agree with, because the greater majority of mental defectives are not vicious.

And those are the essences of which I disagree with this.

Q. Now, go back over it again, and tell the Court and jury with what part of that statement you agree?

A. I don't agree with any part.

Q. You—

A. You mean the parts you read to me, and the parts I've read to you?

Q. You don't agree with any one of them?

A. That's correct.

Q. Mental deficiency is not a disease?

(Reading)

A. Mental deficiency is not a disease.

Q. What is it?

A. Mental deficiency may arise as the result of a disease process; it may arise as the result of a birth injury, which is a disease, a destruction of nervous tissue—may arise as the result of a birth injury, an injury to the brain, which in [fol. 593] itself is a disease, and, therefore, the mental deficiency is caused by the disease process. But it may arise from a disease known as encephalitis, which occurs in infancy and arrests the development of the brain, and if we had a pathological specimen here, you could see changes in the nerve cells. These are pathological disease processes. I don't agree that that's not a disease.

Q. Would you agree—would you read the second sentence of the first paragraph—do you agree with that?

A. (Reading) A mental defective is not a person who suffers from a specific disease process, but one who by reason of intellectual arrest or impairment is unable to cope with his environment to the extent that he needs special care, education and institutionalization.

I don't agree with that.

Q. You don't agree that one who is mentally arrested or has impairment has difficulty adjusting themselves to a social environment?

A. Some do; some don't. This is a general statement—saying that this applies to all mental defectives.

Q. Would you agree that some mental defectives do come within this characterization?

A. Certainly. You talk about institutionalization—an idiot whose mental level is pretty low, as you know.

Q. No, I don't. This is a new field for me.

[fol. 594] A. I see. An idiot whose I.Q. may be 20 is obviously unable to care for himself, and requires supervision and perhaps institutionalization.

However, fortunately, the greater majority of people who suffer from mental deficiency are not of that caliber, and most of them can become and do become productive citizens, and good citizens.

Q. Doctor, would you care to change your opinion as to those two paragraphs I read to you if I told you that Dr. Klein, who preceded you on the stand, said that he agreed with them?

A. I cannot speak for Dr. Klein—

Mr. Smithson: I don't believe the doctor can agree with it—I object to that.

The Court: Sustained.

The Witness: Am I allowed to add to it?

Mr. Carey: No, you are not; I will ask the questions. The prosecutor may allow you on cross-examination.

Q. Doctor, are these your notes?

(Indicating papers)

A. Yes, they are.

Q. May I see them?

A. Yes.

Mr. Carey: May I have Mr. Ackerly look at these while I [fol. 595] continue?

The Court: Yes.

Q. Doctor, can a mental defective be improved? Can he be cured?

A. If you will define to me what you mean by "mental defective" and what you mean by "cured."

Q. What is a mental defective?

A. A person suffering from a mental deficiency; according to present standards, anybody with an I Q. below 70 is considered a mental defective.

Q. Is it possible to cure him of that mental defect?

A. It is not.

Q. It is not. Are you familiar with the Durham rule here in the Court of Appeals?

A. I believe so, as far as I can be.

Q. Does this defendant come within the ruling of the Durham opinion as far as the mental defect is concerned?

A. Will you state that opinion to me so I can see whether—

Q. I asked you if you were familiar with it—

A. I said I had heard of the Durham decision—

The Court: I didn't understand the question either. Re-state it.

Q. All right. Have you ever read the opinion of the [fol. 596] Court of Appeals in the case of Durham versus the United States?

A. Not entirely, no.

Q. Are you familiar with it in substance?

A. I know what I read in the newspapers.

Q. What is your opinion of it? What do you consider it to say?

A. Well,——

Mr. Smithson: Your Honor, since the doctor is a psychiatrist, and is being asked to express an opinion on a legal issue or legal test, if the counsel wants it, I have one instruction that has been approved that he might use, but I don't think he could express——

The Court: I don't see how the doctor can answer it when he says that he hasn't read it.

Mr. Carey: Your Honor, he said he read parts——

The Court: Oh, no, he said——

The Witness: Newspaper reports.

The Court: Newspaper reports.

By Mr. Carey:

Q. So then you are not familiar with the test laid down by our Court of Appeals so far as soundness or unsoundness of mind is concerned?

A. I know what I read in the newspapers.

Q. Well, answer my question, please.

[fol. 597] A. I have never read the legal decision.

Q. So you are not familiar with it?

Mr. Smithson: He said he hadn't——

Q. Is that correct?

A. I am familiar with the implications which have been recorded by newspapers.

Q. Do you know what percentage of the population is in the 67 per cent intelligence quotient category?

A. I do not.

Q. You are not familiar with it?

A. No, I am not.

Q. Do you know what category you would place a man with an intelligence quotient of 67 in?

A. Any man——

Mr. Smithson: Your Honor, I believe this is——

The Witness: Any man——

Mr. Smithson: Just a minute, Doctor, I want to be heard. Your Honor, this has been pretty speculative. We've assumed Mr. Lewis was here, and we've assumed a graduate of the University of Iowa, I believe,—it's a fairly speculative question, and now he's asked him to assume if a person, shall we say "X", with a quotient of 67, without any examination, where he would put him, I think that's a little speculative, Your Honor.

[fol. 598] Mr. Carey: Well, I thought we were allowed to assume when we had a professional witness on the stand. It's news to me that you can't ask an assumption of a professional witness.

The Court: Hypothetical cases should be based upon the facts of the case as established by the evidence.

Objection sustained.

Mr. Carey: Excuse me, Your Honor, a moment.

The Court: Yes.

Mr. Carey: No reflection on you, Doctor, but you write as badly as I do. I can't read your writing, so I can't cross-examine you on it.

He writes gratuitously for this situation, Your Honor.

The Court: I'm glad you are not talking about mine.

Mr. Carey: My daughter writes as badly as I do.

By Mr. Carey:

Q. Doctor, are you familiar with manic-depressive psychosis?

A. I am.

Q. What is a manic-depressive psychosis?

A. It is a mental illness which is manifested by either periods of manic activity or depressive state, or both, either alternately, or by either one or the other; they might alternate, or they might be in cycles, first for manic, then depressive, that way.

[fol. 599] The manic phase is manifested by over-activity, increased pressure of speech, flight of ideas, irritability, many times

grandiose delusions, and poor judgment, in that the person gets involved in difficulties because of his over-activity.

The depressive state, which is just the opposite, is manifested by a slowing-up process, depression, as the name implies; difficulty in concentration, retardation in thinking, usually ideas of self-accusation and self-depreciation, ideas of guilt, and, quite frequently, suicidal preoccupation.

Q. Now, Doctor, you can't have both at the same time? You can't have manic and depressive at the same time, can you?

A. Well, there is one in that large group, there is one classified as mixed type, in which you can—

Q. You mean alternates from one to the other?

A. No, no; the symptoms of both exist at the same time.

Q. Oh, concurrent symptoms?

A. That's right.

Q. When one has a manic-depressive psychosis, ordinarily the manic exists at one time, and ordinarily the depressed state exists—it is unusual for them to exist at the same time, isn't it?

A. It is not, because the manic state is a device being used by the person to run away from his depression.

Q. Uh huh. Now, during that period of time when one [fol. 600] has a manic-depressive psychosis, does he ever slip into a period of normalcy?

A. "Slip in" would hardly be the word.

Q. Well, because of the uniqueness of the language, I have to say slip. What is your word? I'll take your word.

A. Can he recover from his illness, or does it pass and become normal, I would say yes.

Q. I mean, for instance, a man may be in a manic state today, which is a high state of exhilaration and wants to do a lot of talking, then may go into a depressed state with suicidal attempts. You have these two situations. Now, there are times when he becomes normal again, where he is neither in that manic state where he wants to talk and go or he wants to commit suicide, is it in that period where he is normal?

A. Well, it's not as clear-cut as that. Assuming a person is over-active, there's a gradual defervescence of activity; it is not a sudden change from over-activity to normality, but rather a gradual change, so that for a long time some



of the symptoms remain, and the person who is trained as a psychiatrist can discover and observe these in the patient until fully recovered. After awhile it's possible for the patient to recover, but it's a gradual process; there's no sudden change.

Q. Well, now, when this gradual process is developing [fol. 601] from the manic stage to the depressed stage, does he have to go through the period of normalcy?

A. He doesn't have to.

Q. Does he jump over, or what occurs?

A. No, it's a gradual sliding down.

Q. Yes, that's what I mean.

A. Very gradual.

Q. I'm trying to establish this:

(Mr. Carey went to the blackboard and drew a diagram.)

There it is. This is the high stage up there, right? And down here you have the depressed stage, right? Up here, you are way up, and down here, you are way down, right?

Now, when he goes from that, you say it's a gradual descent, is that correct?

A. That's right.

Q. Is he moving down this way all the time? Are his symptoms less apparent when he goes from the top manic period down, down, down?

A. To the depressed state?

Q. Yes?

A. No, the symptoms are not less apparent; they are simply changing from elation to depression, we'll say.

Q. You mean he just goes from one to another like—  
[fol. 602] A. No, he doesn't. That's why I said there were mixed states when you have a combination of both present at the same time.

Q. Well, when he goes from the manic to the depressed, doesn't he have to go through the neutral or normal period?

A. In many cases that period is not recognizable.

Q. Well, I mean technically, he is going through a period of normalcy, isn't he?

Mr. Smithson: Are we discussing technicalities, or are we discussing graphs, Your Honor? Your Honor, I believe we're discussing whether or not there's a recognition of

symptomatology from manic to depressive state—not theoretical—

Mr. Carey: I'll adopt any identification the prosecutor wants, Your Honor; I have no proprietary interest in it.

Q. Well, when he's going from this top lower manic situation down, you say it's a gradual process. Doesn't he have to go through the normal scale?

A. Sometimes that so-called normal level is so short lived that it's not even recognizable.

Q. Are there times when it is long lived?

A. There are times when a person has a manic episode, this over-excited period, where they never go into a depression, but gradually defervesce or slow down, and come to [fol. 603] what is considered an average normal level.

Q. But my question was this, and I'll ask it again, and maybe you and I just don't understand one another in this particular case—I'm sure it's my fault: When you're going from the manic stage to the depressed stage, you have to get through that middle period. Now you say it is short lived if it does exist, is that correct?

A. That's correct.

Q. Now, I ask you is it ever long lived? Does that normalcy ever exist for a long period when one is shifting from high to low?

A. Then, if it exists for long periods, it is not considered the same attack of illness; it is considered a separate attack of illness.

Q. But you can have a recurrence of this illness and go into a depressed stage?

A. Recurrence, yes.

Q. So it is possible for one who is a manic-depressive to go, either to stop at the normal period and have that period arrested for a long time, or for a short time, isn't that correct?

A. That's correct.

Mr. Smithson: Objection to possibility; I ask that we deal with probabilities in this case.

[fol. 604] The Court: The answer may stand.

Mr. Carey: Frankly, Your Honor, the difference between possible and probable always confuses me.

By Mr. Carey:

Q. Doctor, when you have that short lived or long lived stage in a manic-depressive who's moving downward, if that man were examined during that particular period when he's shifting from high to low, then he's in the middle grade, a psychiatrist could be fooled, could he not?

A. I couldn't be.

Q. Why couldn't you?

A. Because of my experience as a psychiatrist. I can recognize the residual symptoms which he may have, or, from his history, determine the fact that he has had, and thus discover residual symptoms.

Q. Well, if it's long lived, you would have to be an expert of the finest to differentiate between normalcy and abnormalcy, would you not? Is it not possible for an expert, such as yourself, to be deceived if a man is shifting from high to low, and there is a temporary rest between high and low?

Mr. Smithson: Objection to the possibility.

The Court: The answer may stand. You may answer.

Mr. Carey: What is your answer, Doctor?

The Witness: That would not deceive me.

[fols. 605-610] By Mr. Carey:

Q. That would not deceive you even though that arrest had occurred for a month?

A. That is correct.

Q. So you cannot be fooled by a man shifting from high to low because of what you call residual symptoms, is that correct?

A. That is correct.

Q. What are residual symptoms?

A. The type of personality structure, the so-called extrovert person in whom such a type of illness occurs, and the fact that I take a history of the patient; if he comes to me, obviously is going to tell me about illnesses that he's had. So, in my own mind, I can reconstruct the course of illness, and decide what questions to ask that particular patient, but there are no standardized questions one asks each patient.

[fol. 611] DR. MORRIS KLEINERMAN, the witness on the stand at adjournment on Thursday, November 20, 1958, resumed the stand and further testified as follows:

The Court: Mr. Carey, who will you have now?

Mr. Carey: We have no further questions of the witness, Your Honor.

The Court: Mr. Smithson, will you call your next witness, or are you through with this one?

Mr. Smithson: I believe I have one or two more with this witness, Your Honor.

The Court: You may proceed.

Redirect examination.

By Mr. Smithson:

Q. Doctor, during your cross-examination you were asked with regard to the Wechsler-Bellevue scale and the weighted average, the line of 70 was discussed with you. Do you recall that?

A. I do.

[fol. 612] Q. Now, Doctor, you made a statement that a person with an I.Q. below 70 might be or might have a mental defect, is that correct?

Mr. Carey: Objection to that, Your Honor. That isn't what he said. He didn't say might be. He said he was. He didn't qualify.

The Court: We will let the doctor say what he did say.

A. I said that according to the present accepted standards a person whose I.Q. is found to be below 70, on the Bellevue-Wechsler test, is considered to be mentally deficient.

Q. Now, Doctor, in that regard, mentally deficient, that is a psychological test, Doctor?

A. That is only a psychological test and nothing more.

Q. Does that test alone, Doctor, in the mind of a psychiatrist determine a person to be a mental defective?

A. It does not.

Q. What plays, if anything does, any part in that determination by a psychiatrist?

A. The mental examination done by the psychiatrist of that particular patient.

Q. Going to your examination of the defendant Willie Lee Stewart, knowing, sir, as Mr. Carey I believe it was put it to you, that he had a weighted average of 65 on that Wechs-[fol. 613] ler-Bellevue, do you find, sir, from your examination, plus the information of the 65 I.Q., that the defendant is a mental defective?

A. I don't believe so.

Q. Now, Doctor, assume, Doctor, that a mental defect is a condition of the mind which is not considered capable of either improving or deteriorating, or which may be either congenital, that is, existing at birth, or the result of injury, or the residual effect of a physical or mental disease, in other words, a mental defect as a permanent condition, do you find such a mental defect as defined in the defendant?

Would you hold off.

Mr. Carey: I am going to object to that, Your Honor. He is assuming facts in that question which are not in evidence. As long as this man had a congenital defect, there is no evidence he had a traumatic defect, there is no evidence what caused that defect. So I say the hypothetical question assumes facts which are not in evidence.

Mr. Smithson: Your Honor, will you hear me?

The Court: I will not argue. The objection is overruled. Take the answer.

A. Would you repeat that again?

Q. Yes, Doctor, I will be glad to.

Assuming, Doctor, that a mental defect, assume this as a fact, is a condition of the mind which is not considered [fol. 614] capable of either improving or deteriorating, or which may be either congenital, that is, existing at birth, or the result of injury, or the residual effect of a physical or mental disease, a permanent condition not capable of improving or deteriorating, do you find or did you find, sir, on March 25th of 1953, as of March 12th of 1953, such a mental defect in the defendant?

A. I did not find such a mental defect.

Mr. Smithson: That is all I have of the witness.

# Recross-examination.

By Mr. Carey:

Q. Doctor, what is the difference between a mental defective or a mental deficient? They are synonymous, aren't they? They mean the same thing, don't they?

A. A mental defective and a mentally deficient person in the popular usage of these words is usually considered to be the same thing, but—

Q. Go ahead. I have no objection. Explain as long as you wish, Doctor.

The Court: Finish your answer.

A. When you use the word mental defect, that is different, a different term entirely in my opinion.

Q. The reason I asked that is this: The first question asked you by my friend, the prosecutor, you said one whose I.Q. was less than 70 is a mentally deficient. Did you mean that synonymous with a mental defective? Is he a mental [fol. 615] defect or is he not a mental defect? By "he," I mean the defendant.

A. Well, I would say such a person does not have a mental defect. But in the popular usage of the term, the ordinary lay person certainly equates the two, mentally defective and mentally deficient.

Q. Well, upon whom do you rely for your professional opinion, one whose intelligence quotient is less than 70 is not a mental defective?

A. This is the standard—

Q. Please answer the question. Explain all you wish. Upon whom do you rely to testify here in court that a man whose I.Q. is less than 70 is a mental deficient?

Mr. Smithson: Objection to the form of that question, Your Honor. Because, as I understand Mr. Carey, he predicates it on the defendant, or a hypothetical person.

Mr. Carey: I am asking nobody at this time. I am finding out whom this man uses for an authority.

Mr. Smithson: I believe, then, Your Honor, it should relate to this particular case, since that was the bounds of the redirect examination.

Mr. Carey: But he says we use.

The Court: Objection overruled. You may answer, Doctor.



A. The standards which are set up by the American Psychiatric Association.

[fol. 616] Q. From whom does the American Psychiatric Association secure these figures upon which they predicate your professional opinion?

A. If I may explain—

Q. Answer the question first. Explain later.

A. The members of the association.

Q. Well, I thought you testified that securing an intelligence quotient from a person was a psychological job, not a psychiatric job?

A. It can be done by psychological tests, certainly. It is done frequently that way. But a psychiatrist, who is experienced, can judge the intellectual level and thereby the intelligence quotient of the patient.

Q. But if a psychiatrist subjects a personality to an intelligence quotient or an I.Q., he uses the tests which are set up by psychologists, does he not?

A. Not always. He uses—

Q. Well, generally?

A. I can't speak for all psychiatrists.

Q. Do you use intelligence quotient tests?

A. I use my own tests in that I have learned that a person who has a certain I.Q. can answer certain questions, while a person below that I.Q. can't. This has been my experience.

Q. Are you suggesting to this Court and jury that the psychiatrists of America repudiate the topflight psychologists of America and determine a man's intelligence quotient—

Mr. Smithson: I object to the form of that question in the supposition status.

The Court: Sustained.

By Mr. Carey:

Q. What reports do you use to determine whether a man is mentally deficient or a mentally defective?

A. Usually as a result of my examination, my own examination, I have what in my opinion, my experience has been, a pretty good idea what this man's intellectual level is; whether it's normal or below normal or low normal, as the case may be.

Q. Well, your conclusions, that a man with an I.Q. of less than 70 is mentally deficient but not mentally defective, is determined by you as a psychiatrist, not as a psychologist, is that correct?

A. If I might say—

Q. No, no, no. Please answer the question first.

Mr. Smithson: I don't—

A. You are implying words to me that I didn't say.

Mr. Smithson: I don't believe the witness can, because I believe that counsel in proposing the question assumed a fact which the witness has not stated.

[fol. 618] Mr. Carey: I am asking him. I am asking him what he used. I didn't any fact.

The Court: I think it would be better if you restate the question.

By Mr. Carey:

Q. What do you use to determine a man's intelligence quotient?

A. I ask the patient certain questions to examine his intellectual abilities. And as a result of these questions, the answers to these questions, I determine in my own mind this man seems to have normal intelligence, or doesn't.

Q. Well, what do you use to determine whether this man is normal or subnormal intelligence?

A. I ask him certain questions. For instance, one, if a man can multiply seven times nine, that brings him pretty close to normal; a person who is mentally deficient, very much mentally deficient, cannot answer that question.

Q. Is it not true that a lot of people crazy can recite Homer's Iliad or any of Shakespeare's almost by rote, are mathematical wizards?

A. I am not competent to testify. I have never heard people to do that.

Q. Have you ever had a patient in your office or in a hospital who was able to do algebra and because of his ability to do algebra you say he is sane?

[fol. 619] Mr. Smithson: I believe that the question should be that he did not have a mental defect, not sane or insanity. Sanity under the Durham rule embraces disease by—

Mr. Carey: This man says if a patient is able to multiply seven times nine equals sixty-three, then ipso facto, that man is of sound mind.

Q. Is that your testimony?

A. That is not my testimony.

Q. That is what you said, you give him the multiplication table.

The Court: That is argument. Put another question.

By Mr. Carey:

Q. What else do you use besides asking him seven times nine?

A. I attempt to determine whether or not he can make change. In other words, I pose a problem. He goes to a grocery store, buys a certain amount of groceries or other items, hands the man a dollar bill. How much change would this man have to give him.

Q. And if he gives you the correct change, he is of sound mind?

A. No. I add all of these items together before I determine that. It is not one single item.

Q. All right. All right. You asked Willie Lee Stewart how much is seven times nine. What else did you ask him?

[fol. 620] A. I asked him how much is seven plus—I have got it right here. For instance, how much is seven plus two.

Q. Seven plus two?

A. How much is seven times two.

Q. Seven plus two equals nine and that makes a man sane. One of the things you take into consideration?

A. I said that is one of the many factors.

Q. How are the "many" factors, and I use the word "many" in quotes, did you use on Willie Stewart? Seven times nine; seven plus two; where were you born; how old are; and are you married.

A. I used as many as I considered necessary.

Q. What were the others that you considered necessary in your one hour and a half examination, or less than that?

Mr. Smithson: I believe the witness testified two hours.

Q. All right; let's make it two. I won't quibble about a half an hour.

A. I asked, in addition to this history, his previous ex-

periences, in the Army, seven times two, capital of the State of South Carolina, where he lived, and, as I stated before, his entire past history: date of birth; his age; and many other questions about him.

Q. What are the many other questions?

A. I can repeat them, but exactly the same as I stated in [fol. 621] my appearance here last week.

Q. So, really, the only educational question that you asked this man was how much, or is—I never know—seven times nine or seven plus two, is that correct?

A. No. How much seven times two was.

Q. One of the educational questions you asked this man other than seven times nine and seven plus two?

A. These weren't necessarily educational questions. These were intelligence questions, to determine his intelligence level.

Q. What other questions did you ask to determine his intellectual activity, if any? Seven times two, Willie knew that, so you say Willie must be sane?

A. I don't believe I said that.

Q. Seven plus two, you didn't ask?

A. I did. But I didn't say because of this Willie must be sane.

Q. Your ultimate conclusion was Willie must be sane?

A. Not only based on these tests but based on my entire examination and observation.

Q. All right, Doctor, where did you get the idea, the way to test a man was by asking him what seven times nine and seven plus two are? Was that your idea or did you get that from psychologists?

A. I, over my years of experience, I determined from my [fol. 622] own—

Q. But from experience first, I know you are a man—

The Court: Wait. Let him answer.

A. Over my years of experience I determined for myself that certain tests were indicative of the person's intelligence level. And I use those tests.

Q. Well, then, you must have gotten the information about a mental deficient or a mental defective from somebody other than you, wasn't that correct? You weren't the first man to come up with the idea of a mental deficient, were you?

A. Of course not.

**Q.** Who was the first to come up with it? Wasn't it the psychologist rather than the psychiatrists?

**A.** I don't know whether you mean the use of the term or the method of determining the existence of mental deficiency or not.

**Q.** Is it not true when you want to take the intelligence quotient of a person it is usually done by a psychologist and not a psychiatrist? Isn't that correct? That is his field; measuring intelligence is a psychological task?

**A.** But—

**Q.** Answer the question; yes or no.

**A.** Not necessarily.

**Q.** Well, generally it is not true?

**A.** I couldn't say generally.

[fol. 623] **Q.** In our schools, who gives intelligence quotients, psychologists or psychiatrists?

**Mr. Smithson:** Your Honor, may I be heard?

**The Court:** Yes.

**Mr. Smithson:** All during Friday—I object, Your Honor.

**The Court:** Yes. Objection sustained.

**Mr. Smithson:** May I be heard a little further, Your Honor, at the bench?

**The Court:** Yes.

**Mr. Smithson:** Thank you.

(At the bench:)

**Mr. Smithson:** All during Thursday, Your Honor, and Friday—

**Mr. Carey:** We weren't here Friday.

**Mr. Smithson:** I beg your pardon, Counsel. You are right.

All during Thursday and again this morning while Mr. Carey was examining the witness, the various times when I made objections Your Honor rules sometimes for the Government and sometimes for the defense. I can't recall a single instance on that day or today when I have stood up to make an objection that I haven't heard from Mr. Ackerly at the defense bench, "Oh, shut up," or "Oh, sit down."

**The Court:** Is that true?

[fol. 624] **Mr. Ackerly:** I don't think I said shut up, Your Honor. I was trying to hear the answers to it.

**The Court:** Did you say something like that?

**Mr. Ackerly:** I said sit down to Mr. Smithson.



The Court: Then, that is very wrong.

Mr. Ackerly: I am sorry, Your Honor.

The Court: Let's not let that happen.

Mr. Ackerly: Yes, sir; I was just trying to make notes on the answers, but I am sorry.

(Counsel returned to trial tables.)

By Mr. Carey:

Q. Doctor, do you know, because of your broad experience, that psychologists consider anyone under 70 a mental defective, and by "70," I mean one whose intelligence quotient is a mental defective?

A. Do I know that? Have I heard that, do you mean?

Q. Do you know that psychologists consider one whose intelligence quotient is under 70 to be a mental defective?

Mr. Smithson: In that regard, Your Honor, since we are dealing with a mental disease and a psychologist cannot express an opinion on mental defect or disease, I would object to the question. It is not what psychologists believe; it is what doctors of medicine skilled in the field of psychiatry.

Mr. Carey: It is already in evidence, Your Honor.

Mr. Smithson: It is in evidence on cross-examination. But the witness has disagreed with the book.

[fol. 625] The Court: I will take the answer.

Mr. Carey: All right, Your Honor.

A. Would you mind repeating again?

Q. Do you not know that psychologists consider one whose intelligence quotient is under 70 to be a mental defective?

A. Mentally deficient, yes.

Q. Mentally defective, I asked. Yes or no.

A. I don't know whether that word is used by psychologists. I know they consider mentally deficient.

Q. Are you familiar with David Wechsler, one of the outstanding psychologists in the world?

Mr. Smithson: Object to the predicate; as to outstanding in the world.

Mr. Carey: Let the doctor answer.

The Court: Wait a minute. Objection sustained.

Mr. Carey: Thank you, Your Honor.



Q. Doctor, I will show you a book which you saw heretofore. It is identified as "The Measurement and Appraisal of an Adult Intelligence." It is by a man by the name of David Wechsler, whom I am sure you know. Is that correct?

A. That is correct.

Q. By reputation?

A. By reputation.

Q. He is the chief psychologist at Bellevue Psychiatric Hospital, adjunct professor of psychology, Graduate School [fol. 626] of Arts and Sciences, New York University, clinical professor of clinical psychology, New York College of Medicine. Fourth edition, published 1958. I ask you to look at page 42. Look at the table and see what he indicates one's category is whose intelligence quotient is 70 or plus.

The Court: You must ask a question. You must ask a question.

By Mr. Carey:

Q. Do you know Mr. Wechsler?

The Court: No; don't let him read from the book. You must ask questions.

Mr. Carey: I thought maybe he would have no trouble, Your Honor. We are both looking at the book together.

The Court: You stand back and ask your questions.

By Mr. Carey:

Q. Do you know that Mr. Wechsler catalogs one whose intelligence quotient is 70 or less as a mental defective?

A. It says so right here in the book.

Q. Your answer to that is yes?

A. I see it in this book, yes.

Q. You don't challenge it because you see it in the book? And Carey didn't put it there.

Mr. Smithson: We object to the remark.

By Mr. Carey:

Q. Now, Mr. Witness, on page 579 of the transcript of Thursday, November 20, 1958, page 579—Mr. Prosecutor—you were asked this question: "I.Q.'s below"—You were

[fol. 627] asked this question—I am sorry. We go back to 578. Keep the record straight. I don't want to be challenged later on.

Page 578: "Well, is there any point, in your opinion, where a low I.Q. would indicate the presence of a mental disease or a mental defect?"

"Answer: Well, if I may put it this way—"

Do you remember being asked that question and making that answer? —

A. I remember being asked something along that line.

Mr. Carey: Will you stipulate that is the question and answer, Mr. Prosecutor?

Mr. Smithson: I will stipulate that the record beginning on page 578 and 579, Your Honor, with regard to a general question—

Mr. Carey: Let's not identify the question. The question is sufficient.

Mr. Smithson: Then I object to the whole question, since it must relate to the defendant, Your Honor.

Mr. Carey: Is that the jury's determination, as to whether it is general or specific? I don't want any characterization by the Court.

Mr. Smithson: May it please the Court, will you hear me just a moment? As counsel states, the question is there and the answer is there, but it is taken out of context.

[fol. 628] The Court: I think the question has been answered by the witness.

Mr. Carey: You stipulate—

The Court: No.

Mr. Carey: I mean, the prosecutor stipulates I am reading this correctly and that is his answer.

Q. The next question, page 579: "Put it any way you wish.

"Answer:"—This is you testifying. "I.Q.'s below 70 are considered to be signs of mental deficiency."

You recall being asked that question and making that answer?

A. That is correct.

Q. You recall being asked this question, on the same page:

"Question: "Signs of mental deficiency?"

"Answer: Yes."

You recall being asked that question and making that answer?

A. I think so.

Q. Same page:

"Question: Right. Now, continue.

"Answer: All below that are mentally defective."

You recall being asked that question and making that answer?

A. I recall being asked these questions, certainly. And——

Q. Just a moment. That is all I ask you.

[fol. 629] The Court: No; you must let him finish his answer.

A. I repeatedly used the word "mental deficiency" as is noted in that record. And I prefer not to use the word "mental defect." You asked many——

Q. There is your answer: "All below that are mentally defective." It wasn't my question. It was——

Mr. Smithson: May it please the Court, counsel is arguing with the witness. The previous response was deficiency. It appears in that last response: defect. The witness has answered he responded——

Mr. Carey: I merely asked him to corroborate that. I am not putting words in his mouth. I will never do a thing like that.

The Court: Next question, please. You must use the book; not the witness.

Mr. Carey: I just wanted to correct a little difficulty we had there.

Q. Question, page 579: "He is a mental defect. So an I.Q. lower than 70, in your professional opinion, makes that person a mental defect?"

"Answer: According to the present standards, yes."

You recall being asked that question and making that answer?

A. I believe I do.

Q. Question, same page: "And you adopt those present standards in your professional work, do you not?" [fol. 630] "Answer: That is correct."

You recall being asked that question and making that answer?

A. I believe I do.

Q. "Question: 'What is a mental defect?' Same page.

"Answer: A person who is said to have mental deficiency when they cannot adjust to life and its problems in an average, normal way."

You recall being asked that question and making that answer?

A. I do.

Mr. Carey: That is all.

Redirect examination.

By Mr. Smithson:

Q. Doctor, when you were asked those questions—would you hear this and give counsel a chance—when you were asked those questions relative to this weighted average or line of 70, were your answers, sir, in response to Mr. Carey's questions based on what might have appeared or did appear in a psychologist's report, or were they based, sir, on your examination of the defendant Willie Lee Stewart?

Mr. Carey: Your Honor, I shall object to that question because the manner in which it is phrased, what might have appeared, just isn't the way to ask a question. What might have appeared: It is hypothetical; it is conjectural; and it is speculation.

The Court: Objection overruled.

You may answer.

[fol. 631] By Mr. Smithson:

Q. Did you understand my question?

A. I would like to repeat it.

Q. All right, Doctor. Let's approach it in this way, Doctor. At the time that you answered the questions of Mr. Carey regarding your knowledge or the field of psy-

chology and the weighted average of 70, were your answers, Doctor, with regard to that matter of 70 and below as mental deficiency, was that, sir, with regard to the defendant Willie Lee Stewart or with regard to certain standards which have been discussed?

Mr. Carey: Your Honor, I shall object to that question. This witness is my friend the prosecutor's witness. He cannot cross-examine his own witness, nor can he lead his own witness. That question is replete with leading phrases.

The Court: Objection overruled.

Answer the question, please.

A. In my opinion, that referred to a theoretical situation but not to the defendant Willie Lee Stewart.

Q. And, sir, as to the defendant Willie Lee Stewart, do you or do you not find him to be a mental defective?

Mr. Carey: Objection to that. It is repetition.

The Court: That is repetitious.

Mr. Smithson: All right, Your Honor. That is all of the questions.

Mr. Carey: No questions, Your Honor.

[fol. 632] The Court: You may step out, please.

Mr. Smithson: May the doctor be excused, Your Honor.

Mr. Carey: Yes, Your Honor.

The Court: Doctor, you are at liberty to go.

The Witness: Thank you, sir.

(The witness stepped down.)

Mr. Smithson: May I have James W. Hamilton.

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JAMES W. HAMILTON, recalled by the Government in rebuttal, further testified as follows:

The Marshal: Resume the stand. You have already been sworn.

Direct examination.

By Mr. Smithson:

Q. Mr. Hamilton, how long prior to March 12th of 1953 did you know the defendant, Willie Lee Stewart?



A. I think about six years.

Q. Tell me, sir, did you ever have any occasion to play cards with him?

A. Yes; I played cards with him quite a number of times.

Q. What is your estimate, sir, of his ability to play cards?

A. He is good—

Mr. Carey: Objection to that. What has card playing got to do with the first-degree murder case?

[fol. 633] The Court: Objection overruled.

Mr. Smithson: Lay testimony.

Q. What is your estimate of his ability to play cards?

A. He is a very good card player. At least he was, at the time that I was playing with him. Played very good.

Q. With regard to that, sir, tell me, during the Halloween period of 1952, during Halloween of 1952, were you present in the home of Willis Daniels, Julia Daniels, Annie Lee Stewart, Willie Lee Stewart, when the defendant is alleged to have shot at Annie Lee Stewart?

Mr. Carey: Objection to that, Your Honor. It has nothing to do with the thing being litigated here today.

Mr. Smithson: In that regard—

The Court: Overruled.

Mr. Smithson: Thank you, Your Honor.

A. I was not.

Q. You were not?

A. I was not present.

Q. Now, with regard to the defendant Willie Lee Stewart, do you know of your own knowledge whether or not the defendant Willie Lee Stewart ever drank?

A. Personally speaking, I had seen him intoxicated a couple of times.

Q. Tell me, sir—and would you not answer this question until Mr. Carey and Mr. Ackerly have a chance—did there [fol. 634] come a time, sir, a report was made to you of a disturbance which took place in your home at 417 A Street, Northeast?

Mr. Carey: Objection to that. It is hearsay, Your Honor.

Mr. Smithson: Not what was said but whether or not there was a report.

Mr. Carey: I don't see the relevancy of it either.



The Court: Objection overruled.

You may answer it. Don't tell what was said.

The Witness: I beg pardon?

The Court: Just answer the question.

The Witness: Yes, sir.

By Mr. Smithson:

Q. Was there or was there not such a report?

A. Yes.

Q. Following that report did you have any conversation with the defendant Willie Lee Stewart relative to that, whatever occurred in there?

A. I did.

Q. Can you place the date of that?

A. November the 1st, 1952:

Q. And what conversation did you have with the defendant Willie Lee Stewart regarding that incident in your home?

Mr. Carey: Objection.

The Court: Objection overruled.

[fol. 635] A. You want me to tell you about the conversation?

Q. That is right.

A. Well, the conversation was about what had happened the night before, which was

Q. You relate, sir, what was said.

Mr. Carey: Please let's not interrupt the witness. Let him tell his story.

Mr. Smithson: I believe counsel is correct.

Q. I just want the conversation as you recall it.

The Court: Yes. Go ahead now.

A. I asked him about what had happened and he said that he was sorry that it had happened, and as a matter of fact he apologized, and said that it wouldn't happen again.

Q. And at any time did you or the defendant Willie Lee Stewart mention what it was that happened?

Mr. Carey: Objection to that. It is leading.

The Court: Objection overruled.

A. We talked about it.

Q. What was said, sir? What was actually said about what took place at your home the previous evening?

A. Well, I asked him why did he start a disturbance that night over the use of the phone. And he said that he had had a little bit too much to drink and that it wouldn't happen again.

Q. All right, sir. Now, tell me, sir, how long have you [fol. 636] lived at 417 A Street, Northeast? How long did you live there, I should say.

A. I can't be too sure. But I can give you an estimate.

Q. Your best estimate, sir.

A. I should say about six years.

Q. Were you living there, sir, in 1949?

A. Yes.

Q. '50? 1950?

A. Yes. At one stage of 1950, yes.

Q. 1951?

A. No.

Q. 1952?

A. No; I don't think so.

Q. 1953?

A. Yes.

Q. Beginning in what period of 1953, Mr. Hamiton?

A. It was in the fall of '53, I believe. I am not too sure.

Q. Now, how often would you go to that address, 417 A, during a week?

A. Oh, I would come there every day practically. I would have my meals there.

Q. How often during the period from 1950 to '53, during a week, would you see Willie Lee Stewart?

[fol. 637] A. Oh, I can't be too sure. I would say maybe once or twice a week. Sometimes I didn't see him at all.

Q. All right, sir. How often during that period of 1950 to '53 would you play cards with him during a week?

A. Can I hear that again, please?

Q. Yes. During the period 1950 to 1953, how often each week would you play cards with the defendant Willie Lee Stewart?

A. Oh, I—I would say maybe sometimes once a week with him. But I also played with others, you see.

Mr. Carey: I can't hear the witness, Your Honor. He is mumbling over there and I have extreme difficulty.

The Court: Keep your voice up, please.

Mr. Smithson: May we have the answer read?

(The answer was read by the reporter.)

Q. During the time, sir, that you were playing, where would these games take place?

A. Oh, they would take place upstairs at 415 A Street. Usually in Mrs. Coleman's room.

Q. And during the time from 1950 to 1953, at any time while you were playing in those games, was there ever discussed with you or in your presence whether or not Willie Lee Stewart had tried to throw one of his children in a furnace?

Mr. Carey: Objection to that.

[fol. 638] The Court: Objection overruled.

You may answer.

A. No; no one ever discussed that with me.

Q. During that same period was anything said about Willie Lee Stewart in your presence or to you in that discussion throwing one of his children out of a window?

A. No; we only talked about cards, and the game.

Q. Based on your acquaintanceship over the period of six years and your knowledge of the defendant, tell me, sir, do you have any opinion whether or not he is of sound or unsound mind, as of March 12, 1953?

A. Well, I would have to judge by the times that he was in my presence and how he conducted himself, as you know I am not a psychiatrist, but all I can say is that at that time, he seemed normal to me.

Mr. Smithson: Your witness.

Cross-examination.

By Mr. Carey:

Q. Mr. Hamilton, did the Stewart family on any occasion discuss their intimate family's secrets with you?

A. No; I don't believe so.

Q. They never discussed their intimate family secrets with you, did they?

A. No.

Q. All you ever did was play cards in a social manner and discuss the card game, is that correct?

[fol. 639] A. To the best of my knowledge.

Q. Have you ever testified in court before?

A. Yes; I have.

Q. How many times?

A. This would be six times, I suppose.

Q. Six times. Three times with Willie Lee Stewart, is that correct?

A. That is right.

Q. What were the other three times?

A. It refers to this particular case.

Q. What is that?

A. I am speaking about this case here. That is all to my knowledge.

Q. The only six times you have ever testified in court is in connection with Willie Lee Stewart, is that correct?

A. As far as I know.

Q. What do you mean, as far as you know?

A. Well, I say as far as I can remember.

Q. Why don't you try and remember for a moment.

A. I will try. Maybe, but I don't remember.

Q. You don't remember. Did you ever testify before on a psychiatric opinion?

A. You mean in regards to another case? Not to my knowledge.

Q. You are not an expert in the field of psychiatry, are [fol. 640] you?

A. I am not.

Q. You don't pose to be an expert, do you?

A. I don't.

Q. You don't suggest you are an expert, do you?

A. I am not a psychiatrist.

Q. You don't believe you are an expert, do you?

Mr. Smithson: I believe, Your Honor, it is conceded; it wasn't offered as an expert. It was offered as lay testimony and I believe the pattern in which the questions are being asked is argumentative with the witness.

Mr. Carey: If I understand the rule of law, if a layman does—

The Court: Restate the question.

Mr. Carey: I asked him if he is posing as an expert.

Mr. Smithson: I objected, Your Honor.

The Court: Objection sustained.

Mr. Carey: He is not an expert? No questions.

Mr. Smithson: I have nothing else of this witness.

(The witness stepped down.)

Mr. Smithson: Your Honor, may this witness be excused?

The Court: Is that agreeable?

Mr. Carey: Yes, Your Honor. Perfectly agreeable.

[fol. 641] The Court: Very well. The witness is free to go.

Mr. Smithson: Is there a witness, Earl Jones, here?

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EARL JONES, called as a witness by the Government in rebuttal, was sworn.

Mr. Carey: Your Honor, may we approach the bench a moment?

The Court: Yes.

(At the bench:)

Mr. Carey: We are going to object to this man's testimony. This is a total surprise to us. We have never heard of the name. We don't know who he is. We don't have any idea what he is going to testify. We think on a first-degree murder——

Mr. Smithson: Of course, that is normally true, Your Honor. But this is a rebuttal witness.

Mr. Carey: It was my understanding when I was a prosecutor, it was the procedure in the office when I was there, to give a list of every witness who was going to testify. Not only did they do it but it was statutorily required.

The Court: That rule couldn't remain with respect to rebuttal.

Mr. Ackerly: May we inquire, Your Honor, whether this man is not an attendant at Saint Elizabeths?

Your Honor, may we inquire if this man——

[fol. 642] Mr. Smithson: He is an attendant at Saint Elizabeths.

Mr. Ackerly: Your Honor, this man was not out at Saint Elizabeths until December 1957. This man never saw Saint

Elizabets until December 1957. So anything he would testify would have nothing to do with what happened in March 1953.

The Court: That will depend upon the testimony.

Mr. Ackerly: That will be highly prejudicial.

Mr. Smithson: Would Your Honor hear me? Counsel would be absolutely correct if counsel had not made the present mental condition of this defendant an issue when they put him on the stand. Your Honor, the jury had before them what his answers were to Mr. Carey and his answers to me. On that they were supposed to judge his condition on March 12, the date concerned. For the first time they put him on the stand and that is when they put that fact before the jury. Unless I am permitted to bring on these witnesses to show what his condition has been from the period of incarceration both at Saint Elizabeths and D. C. Jail, then the Government is forestalled from putting on all the evidence to rebut the testimony of Willie Lee Stewart.

Mr. Carey: Your Honor, the present competency of the defendant is not an issue at this specific time. That determination was made when we held the hearing at about two [fol. 643] weeks ago, at which time you concluded from the testimony the man was mentally competent to stand trial and assist his counsel. He was put on the stand only for one purpose: to testify as to the facts for which he is being tried here.

The Court: What facts?

Mr. Carey: As to whether he committed the crime or whether he did not. We didn't go into his mental competency whatsoever. We didn't bring that into issue.

They are now going to be allowed to discuss this man's mental condition at the present time when it is not an issue in this case. If that be true, then we have a right to bring every psychiatrist who examined him. For instance, when Doctor Williams testified, we asked him nothing about his condition at the present time; because we were precluded from so doing. We are restricted to examine that man on the time he examined him back in March 1953; not at the present time. We think it is outside the issue, outside the present issue, and inflammatory.

Mr. Smithson: Your Honor, that is true as far as they went. It was two days after the man—



Mr. Carey: June, I should have said, instead of March.

Mr. Smithson: Doctor Williams testified before the defendant Willie Lee Stewart—at least he was supposed to have testified out of the presence of Willie Lee Stewart. [fol. 644] Your Honor, it is true that we are concerned with March 12 and his condition, but when, as they open the door, and when they open the door by putting that defendant on the stand, is the Government to be forestalled from combating that impression which was left with the jury?

Mr. Carey: But we didn't open the door as to mental competency. We opened the door as to his taking the stand. We said: Did you commit the crime or did you not? That is all we did.

The Court: Objection overruled.

Mr. Ackerly: Your Honor, may I add this one comment on the record: I believe that the only issue that you can submit to the jury is the man's mental competency as of 1953, and not his competency today. I believe the Government is about to commit reversible error in this case.

The Court: Objection overruled.

Mr. Ackerly: I mean that very sincerely, Your Honor.

(Counsel returned to trial tables.)

Direct examination.

By Mr. Smithson:

Q. Your name is Earl Jones, is that correct?

A. Earl E. Jones.

Q. Mr. Jones, I want you to keep your voice up. I want you to speak loud enough so each member of the jury may hear you, the defendant and his counsel.

[fol. 645] Mr. Jones, what is your employment?

A. I am a psychiatrist aide in Saint Elizabeths Hospital in the maximum security ward.

Q. Would that be what is known as the Howard Hall?

A. Yes, sir.

Q. How long have you been over there, Mr. Jones?

A. From August 1957 to present.

Q. Prior to that, what was your employment?

A. I was employed by Saint Elizabeths Hospital in the civil commitment section.

Q. How long have you in toto been employed by Saint Elizabeths Hospital?

A. A little better than nine years.

Q. You described yourself, sir, as a psychiatric aide. What is that, Mr. Jones?

A. Well, I—we have special training and administer medications and generally relieve the nurse, or we have duties similar to nurses, psychiatric nurses.

Q. Tell me, sir, you say you have certain training: Do you have any training in psychiatry or the handling of psychiatric patients?

A. Yes, sir; we do.

Q. Now, when were you given your rating of a psychiatric aide?

A. I was made a psychiatric aide in November—

[fol. 646] Mr. Ackerly: Your Honor, the man is referring to notes. I think he should exhaust his recollection first and if he can't remember—

A. I could give you a specific date, but it was November of 1955.

Q. Were you so employed in Howard Hall, sir, in December of 1957?

A. No, sir.

Q. Now, when did you go to Howard Hall?

A. No, sir; I am wrong, sir. I was employed there—yes, in December of 1957, I was.

Q. And did you have, sir, during the time that you were there, occasion to see one Willie Lee Stewart?

A. Yes, sir; I did.

Mr. Carey: Objection.

By Mr. Smithson:

Q. Do you see him here today?

A. Yes, sir; I do.

Q. Where is he?

A. He is directly in front of me. Right there, sir.

Q. How is he dressed at the moment?

A. Well, he has on a sport shirt, gray.

Mr. Carey: Let the record reflect he identified the defendant. We don't question that.

Mr. Smithson: Thank you.

The Court: The record will so show.

[fol. 647] By Mr. Smithson:

Q. Now, during the time that you were there, how long was Willie Lee Stewart there, if you know of your own knowledge?

A. He was there from December until April.

Mr. Ackerly: Of what year?

The Witness: From December of 1957 until April of 1958.

Mr. Ackerly: In that event, Your Honor, we object to any testimony by this witness. He said he never saw him until December 1957.

— Mr. Smithson: I believe, Your Honor, we have discussed this already at the bench.

Mr. Ackerly: I think I have to, to protect the record, Your Honor.

The Court: Objection overruled.

Proceed.

By Mr. Smithson:

Q. Now, during the course of the time that he was at Saint Elizabeths Hospital, how often would you see the defendant Willie Lee Stewart?

Mr. Ackerly: Objection. It is leading, Your Honor.

The Court: Objection overruled.

A. Shall I answer that?

Q. Yes, please.

A. I seen him approximately, at least four days out of [fol. 648] each week. With the exception of one period when he was transferred downstairs to another ward to make room for a vacancy for incoming patient. And that was in the month of the 1st of January—no, the 8th of January until the 31st of January.

Q. Now, during that time that he was there while you were on duty, did you ever have any occasion to discuss with the defendant Willie Lee Stewart his family?

Mr. Ackerly: Objection. It is leading, Your Honor. These are very leading questions.

The Court : Objection overruled.

Mr. Smithson : Thank you.

A. I only on one occasion asked him did he have children.

Q. Did you say you asked him something? What was that?  
I didn't hear you.

A. On one occasion I asked him did he have children.

Q. Did he make any answer to you?

A. He said he had eight.

Mr. Ackerly : Eight children?

The Witness : Eight.

By Mr. Smithson :

Q. Now, tell me, did the defendant have any personal property at that institution, if you know?

A. Yes, sir ; he did.

Q. Was there ever any request by him for any of that  
[fol. 649] personal property?

A. Yes, sir.

Q. Do you recall what it was he requested?

A. He requested some pictures of his family.

Q. Just his family, or did he identify them?

A. He said that he wanted pictures of his family.

Q. Do you know whether or not they were given to him?

A. Yes, sir ; they were.

Mr. Ackerly : By whom?

By Mr. Smithson :

Q. Did you ever have any discussion with him regarding his education?

A. No, sir ; I didn't.

Q. During the time that he was there did you have occasion to observe whether or not he got along with the other patients?

A. Yes, sir ; I did.

Q. Tell me, would you give us, describe as best you can, what if any actions you observed of the defendant, his conduct, what he did, and how he got along while he was within your observation at that institution.

Mr. Ackerly: Objection, Your Honor. I don't think that is the way he should examine a witness. He should ask him questions.

The Court: Objection overruled.

A. He was always a model patient. He was no specific [fol. 650] trouble. He never acted any way hostile or upset in any way. And he generally got along with the patients well. He had no disturbance with them whatsoever or with the employers.

Q. Tell me, sir, did he ever at any time tell you he was talking with God?

Mr. Ackerly: Objection, Your Honor. This is terribly leading.

The Court: Yes, that is leading.

Mr. Smithson: Yes, it is, Your Honor, but I can't very well go into the examination of the witness without referring specifically what the witness Willie Lee Stewart said from the stand.

Mr. Ackerly: Your Honor, the witness should testify, not the prosecutor.

The Court: Yes, objection sustained.

By Mr. Smithson:

Q. All right. Tell me, sir, during the time that you were at that institution was there any reports given to you by the defendant Willie Lee Stewart of any hallucinations or illusions?

A. No, sir.

Mr. Ackerly: Objection, Your Honor. It is also leading.

The Court: Objection overruled.

You may answer.

A. No, sir.

[fol. 651] Q. Tell me, sir, are the patients at Saint Elizabeths given any games or anything to play?

Mr. Ackerly: Objection, Your Honor.

The Court: Objection overruled.

A. Yes, sir; they are.

Q. What, if any, games did you ever see the defendant Willie Lee Stewart play?

A. I seen him play cards or the popular game there was so-called bid whist, and checkers.

Mr. Carey: What is that first one?

The Witness: Bid whist.

Mr. Carey: Bid whist?

The Witness: Yes, sir. That is when you play whist and you bid how many points.

By Mr. Smithson:

Q. And did you say checkers also, or not?

A. Yes, sir.

Q. Tell me, sir, do you know whether or not the defendant could read?

Mr. Ackerly: Objection. That is a conclusion.

The Court: Objection overruled.

A. I couldn't say specifically whether he could or not, sir.

Q. Have you ever observed him, sir, with any books or magazines?

[fol. 652] Mr. Ackerly: Now he is impeaching his own witness.

The Court: Objection overruled.

A. I have seen him with a Bible.

Mr. Carey: With a what?

The Witness: A Bible.

Mr. Carey: A Bible?

The Witness: Yes, sir.

By Mr. Smithson:

Q. Anything else, sir?

A. I did one time see him with a dictionary.

Mr. Smithson: Your witness.

Cross-examination.

By Mr. Ackerly:

Q. Mr. Jones, did any of Mr. Stewart's eight children ever come out to visit him at the hospital?

A. I don't know, sir.



Q. Did you ever see any of his eight children come out to visit?

A. No, sir; I didn't.

Q. Did you ever see his wife come out to visit him?

A. No, sir; I didn't.

Mr. Ackerly: No further questions, Your Honor.

Mr. Smithson: Nothing further of the witness.

The Court: Step out.

(The witness stepped down.)

Mr. Smithson: Lieutenant Depro.

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[fol. 653] ROBERT M. DEPRO, was called as a witness by the Government in rebuttal and, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Smithson:

Q. Your name, sir, is Robert M. Depro? D-E-P-R-O?

A. Yes, sir.

Q. Lieutenant, your occupation is what?

A. Lieutenant, District Jail.

Q. How long have you been assigned of a member of that guard?

A. Thirteen years.

Q. Thirteen years at that particular institution?

A. At that institution, yes, sir.

Q. Tell me, prior to that institution what was your employment?

A. Well, I was employed at Saint Elizabeths Hospital prior to that; Howard Hall, criminal insane division.

Q. What was your capacity there?

A. Attendant.

Q. For how long were you there?

A. Well, I was there approximately five years, with a break in between, military service.

Q. Now, tell me, sir, do you know a Willie Lee Stewart?

A. Yes, sir.

[fol. 654] Q. Do you see him present here?

A. Yes, sir.

Q. Where is he?

A. Seated right there at that table.

Mr. Smithson: Will you stipulate, Counsel?

Mr. Carey: The record reflect.

Mr. Smithson: Let the record reflect, Your Honor, the witness has identified the defendant by stipulation.

The Court: The record will so show.

By Mr. Smithson:

Q. Now, sir, do you recall when you first knew or got to know the defendant Willie Lee Stewart?

A. Well, the exact day, I couldn't say, sir. Approximately, four years ago, I will say, approximately.

Q. And have you had occasion, sir, to observe the defendant since then?

A. Yes, sir.

Mr. Ackerly: Objection, Your Honor. He said four years ago, which makes it 1954. The crime was alleged to have been committed in 1953. His entire testimony is irrelevant and I object to any further testimony by this witness.

The Court: Objection overruled.

By Mr. Smithson:

Q. Tell me, sir, do you of your own knowledge recall whether or not you had seen him in 1953?

Mr. Ackerly: He answered the question, Your Honor.

[fol. 655] Mr. Smithson: Counsel made an objection.

The Court: You may answer.

A. I didn't quite understand the question.

Q. Do you recollect now whether or not you saw him in 1953?

A. I could possibly say yes, sir; I said approximately four years. I couldn't define it right down to '53 or '54. But it was, I'd say, yes, sir.

Mr. Ackerly: Objection, Your Honor.

The Court: Objection overruled.

Mr. Ackerly: I move that answer be stricken. He said "could possibly."

The Court: Motion denied.

By Mr. Smithson:

Q. Now, sir, during this period of time did you have any occasion to observe the defendant Willie Lee Stewart?

Mr. Ackerly: May I have the period of time, Your Honor?

A. Yes.

Mr. Smithson: I believe the period has been established as approximately four years ago; it may have been 1953, the witness has stated.

The Court: You may answer.

By Mr. Smithson:

Q. Since that time have you had occasion to observe the defendant Willie Lee Stewart?

[fol. 656] A. Yes, sir.

Q. How often, during, say a day or a week, would you see the defendant Willie Lee Stewart?

A. Oh, I would see him at least once a day, possibly often, but at least once a day during the course of my tour of duty.

Q. Tell me, sir, were you at any time ever called by name by the defendant?

Mr. Carey: Objection.

A. If he was directing—

The Court: Objection overruled.

A. If he was directing a—

The Court: Read the question.

(The question was read by the reporter.)

A. Yes.

Q. Would you answer?

A. Yes.

Q. Tell me, when you would meet on a particular day, what, if any, conversation ever passed between you?

Mr. Ackerly: Your Honor, these questions are so leading, but they are highly prejudicial.

The Court: Objection overruled.

Mr. Ackerly: Well—

The Court: You may answer.

A. Would you ask that again, sir?

[fol. 657] Q. When you would meet, sir, what, if any, conversation would pass between you from day to day?

A. It is difficult to say exactly what conversation. But if Willie would have an occasion to ask me something pertaining to institution—that may be request he would have to make regarding his personal well being or——

Mr. Ackerly: Objection to this vague characterization, Your Honor.

Mr. Smithson: I believe the witness is answering the question.

The Court: Objection overruled.

Mr. Ackerly: Your Honor, may we have the question re-read? I really don't think this is responsive.

The Court: Objection overruled.

By Mr. Smithson:

Q. Would you continue.

A. Or if he wanted an article of clothing, maybe socks or underwear, at the time he might not have access to, maybe if he wanted to go to see the doctor, he would—things of that nature, why, he would ask me, "Lieutenant," or "Lieutenant Depro," sometimes he would say lieutenant, sometimes he would say Lieutenant Depro.

Q. Tell me, have you ever had any occasion to see the defendant write or receive any writing from him?

A. Well, I have seen him writing. What he was writing, I couldn't say. But I have seen him writing at the table in [fol. 658] his cell. And I have, one or two occasions, received requests from him.

Q. In writing?

A. In writing, yes, sir.

Q. Tell em, do you have them with you?

A. Beg pardon, sir?

Q. Do you have any with you?

A. I have some in his institutional jacket here.

Q. May I have it?

Mr. Smithson: Your Honor, it is 11:15. In order, so we might not delay the Court while I go through this jacket, which is roughly an inch and a half thick, I wonder if we may

have a fifteen-minute recess and I will use the witness's time to confer.

Mr. Ackery: Your Honor, does that mean he is going to confer with the witness?

Mr. Smithson: That is correct.

Mr. Ackery: We object to his conferring with the witness while he is on the witness stand.

The Court: That is the purpose.

Mr. Ackery: We object.

The Court: The objection is overruled.

The jury will please keep in mind the admonition. Take a fifteen-minute recess.

(Thereupon, at 11:15 a.m. a recess was taken.)

[fol. 659]

#### AFTER RECESS

(The Court reconvened at 11:30 a.m.)

The Court: Mr. Smithson, you may proceed.

Mr. Smithson: Yes, Your Honor.

Your Honor, I have this document which I would like to have marked. There are paper clips placed on several of the documents within this folder, which I would at the appropriate time tender, provided Your Honor holds them otherwise admissible. I do not believe I should take them out of the file.

So, may I have the file marked as an exhibit, and such items referred to are the ones with the paper clips on them?

The Court: Very well.

Mr. Carey: May we examine that before—

The Court: Yes.

The Deputy Clerk: Government's Exhibit Number 13 for identification.

Mr. Smithson: Probably counsel might like to look at it before I ask the witness, Your Honor.

(Mr. Smithson handed the file to defense counsel.)

The Deputy Clerk: If there are any other witnesses who have not yet testified, will they retire to the witness room.

Mr. Smithson: Your Honor, I wonder if I might make a suggestion. The defense may not be agreeable, but at least it might be expeditious. I can proceed with some examina-

[fol. 660] tion of this witness without that file, if one of the defense counsel would be willing to examine it.

Mr. Carey: But the one who will cross-examine on this will also cross-examine on the other. If we are going to be absent from the Court when things are done, I will be unable to cross-examine.

We'll do it very quickly; we won't look at it any more than is necessary.

Mr. Ackerly: Your Honor, may we request to borrow some paper clips from the Clerk?

The Court: A little louder, please?

Mr. Ackerly: May we have the use of some paper clips to mark some material in here also?

Mr. Smithson: I have some here that I sent for.

The Court: I don't think I quite understood the request.

The Deputy Clerk: He just wants some paper clips, that's all.

The Court: Oh, yes.

Mr. Ackerly: Thank you.

Mr. Carey: Thank you.

The Court: Yes.

Mr. Carey: Your Honor, I was thinking, this file is quite lengthy, as you observe. I think it's going to take longer [fol. 661] than we anticipated. Do I understand that my friend would be willing to withdraw this witness?

The Court: Mr. Carey, have you examined the parts which Mr. Smithson marked?

Mr. Carey: Yes, Your Honor; we also want to offer in evidence—

The Court: If you will now allow him to proceed, then I will allow you sufficient time to go through the file.

Mr. Carey: The thing is, what he's done, he's done a selective procedure.

Things which are favorable to him, I presume.

The Court: Yes.

Mr. Carey: We would like to select from that; be just as selective as the prosecutor.

The Court: Before you cross-examine on the issue?

Mr. Carey: Yes, Your Honor.

The Court: I'll give you time to go through the file for your purposes.



Mr. Carey: Thank you. May we have this at the lunch hour, if necessary?

The Court: Yes, of course.

Mr. Carey: Thank you.

(Defense counsel continued to examine the file.)

The Court: Since counsel have examined the part of the [fol. 662] record which Mr. Smithson proposes to use, it does seem that we might proceed. And before your cross-examination, the Court will give you sufficient time.

Mr. Carey: We are closer than I expected; there are more clips than I anticipated.

The Court: I thought you had——

Mr. Carey: I thought I had too, Your Honor—I only have a few more.

The Court: Very well.

Mr. Smithson: Your Honor, I wonder, in view of the hour, I am holding a psychiatrist in attendance on the Court; I wonder if he might be excused until the luncheon recess at 1:45?

The Court: We'll see how they get along.

Mr. Smithson: I wonder if I might let that psychiatrist go until 1:45. This witness will take, I think——

The Court: Oh, yes, you may do so.

(Mr. Smithson conferred with the Marshal.)

The Court: Mr. Marshal?

The Marshal: Yes, Your Honor.

The Court: Two o'clock today.

The Marshal: All right, sir.

(Mr. Carey handed the file to Mr. Smithson.)

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[fol. 663] ROBERT M. DEPRO, resumed the witness stand.

Direct examination.

By Mr. Smithson, continued:

Q. I show you, Lieutenant Depro, what has been marked Government's Exhibit 13, for identification, what is that?

A. This is an institutional jacket, administrative folder that contains all commitments, and any administrative papers that may be pertinent to an inmate in our institution.

Q. From your examination of that file, was it maintained in the usual way that such files are usually maintained?

A. For a man that's been in the institution the period of time that Stewart has, yes, sir.

Q. And, sir, is it normal in such institution to maintain such records on all inmates?

A. Yes, sir.

Q. All right, sir. And did you bring that file with you today from the institution?

A. Yes, sir.

Q. Now, Lieutenant, pursuant to my request, have you marked certain documents contained therein on the right side, as you would look at them, with paper clips?

A. Yes, sir.

Q. During the time that you have seen the defendant, Willie Lee Stewart, have you ever received correspondence from him?

A. Periodically; yes, sir.

[fol. 664] Q. And, during the course of your examination of that file, pursuant to my request, did you so mark that correspondence?

A. I have noted those particular requests submitted that are familiar to me; yes, sir.

Q. And are they so marked with the clips on the right side?

A. Yes, sir.

Q. And is the writing familiar to you as that of the defendant, Willie Lee Stewart?

A. Yes, sir.

Mr. Smithson: Your Honor, in so far as those clips on the right side, I don't know where counsel placed his—I believe it was on the other side.

Mr. Carey: Ours are in the lower left, Your Honor.

Mr. Smithson: Then, may I have those which are so identified by him, as having been placed on there by him, offered as part of the institutional file, Your Honor?

Mr. Carey: We are going to object to all of that, Your Honor. There's no showing what he's going to offer in evidence; no showing for what purpose it's going to be offered in evidence; and there's no showing that the de-

fendant has any relationship or connection with what is going to be offered in evidence.

Mr. Smithson: The defendant has been identified as the [fol. 665]-defendant.

The Court: Mr. Smithson, state your purpose.

Mr. Smithson: Well, Your Honor, in all fairness, since the jury is here, I'd rather state it at the bench. I think it's admissible, but I'd rather say my purpose rather than make a speech in front of the jury.

The Court: Very well. Come to the bench.

(At the Bench:)

Mr. Smithson: Your Honor will recall that the defendant took the stand, and Your Honor will recall that he was asked, "Who are you?" "Willie Lee Stewart." Mr. Carey asked him, "Do you have a wife?" "No, I have no wife." "Do you have any children." "No, I have no children, you can have them if you want them." During the course of the examination it was stated that he couldn't read nor write.

We have several letters in here, and memos to various prison officials, written and recognized by this witness as the handwriting of the defendant. Particularly pertinent is a letter dated, I think, the 17th of October of 1958, after he returned from D. C. General, where he had been found to be competent to stand trial.

As Your Honor well knows, we began this particular hearing on October 28th and 29th to determine his mental condition, and the trial on November 12th—the defendant having taken the stand and testified in the manner and with the [fol. 666] characteristics which he displayed, I believe that the matter contained within the letters, that it expresses concern for his family, the payment of money to his wife, his ability to write and discuss the matters that are in those letters, is directly pertinent to this jury—some evidence of the concept of guilt in the case which they are entitled to receive, bearing on whether or not he's of sound mind—

Mr. Ackery: Sound mind as of when? I think he should be required to state an issue of sound mind as of when.

Mr. Smithson: There's no question, the issue is concerned on the trial of March 12, but testimony has been elicited from the witness—

The Court: Well, I called you here because I thought the record showed—

Mr. Smithson: I didn't want to say this——

Mr. Ackerly: This is being introduced to establish that the man is of sound mind as of today?

Mr. Smithson: It's being introduced to dispute the testimony of Willie Lee Stewart and others that he could not read or write and to his actions on the stand.

Mr. Ackerly: The testimony of whether he could write was '53; he's putting in read and write——

Mr. Smithson: You misunderstood——

Mr. Ackerly: These letters are all '58. He might have [fol. 667] taken courses, Your Honor. There's a letter in this file addressed to the Court from Willie Lee Stewart, obviously written by another inmate and signed by him.

Will you note that the lieutenant saw that man write those letters——

The Court: He'll develop it.

Mr. Ackerly: It hasn't been yet. I don't think there's any foundation laid.

The Court: He hasn't even tried yet.

Mr. Ackerly: Yes, he did; he asked him if he recognized it. It's common knowledge that at a jail that one prisoner may write out a statement and another copy it——

The Court: The objection is overruled. You may proceed.

(Counsel having returned to trial tables:)

Mr. Smithson: Now, if I may stand here, Your Honor, because I want to show him certain of these letters and ask him whether or not he can so recognize them.

The Court: Very well.

Mr. Smithson: Thank you.

(Mr. Smithson then stood beside the witness stand.)

Q. Lieutenant, I show you a document dated 4/3, 1953, and particularly a signature which appears on the left side hereof. Can you recognize that signature?

[fol. 668] The Court: Now, wait a minute. You should have an identification mark on that particular document.

Mr. Smithson: Well, I thought of that—that's the reason I put the clips—possibly I should letter it, Your Honor?

The Court: What is the exhibit number?

The Deputy Clerk: 13, Your Honor.

Mr. Smithson: 13, Your Honor.

The Court: Let the Clerk mark the writing which you refer to as 13-1.

Mr. Smithson: All right, Your Honor; there will be a number of them, so if I might——

The Court: All right. 13——

Mr. Smithson: I wonder, Your Honor, if, as I go through these with the clips on, if the Court would permit me to put 13-1, and so state it for the record, 13-2—in other words, it would stop the walking back and forth on a large number of clips.

The Court: I think the record must show that they have been marked as exhibits.

Mr. Smithson: All right, Your Honor.

The Court: Because we are not using the whole file.

Mr. Smithson: That's correct. Then, Your Honor, may I have these items so marked by the Clerk under Exhibit Number 13, as 13-1——

[fol. 669] The Deputy Clerk: 13-1.

Mr. Smithson: 13-1. 13-2. 13-3. 13-4, and 5. 13-5. 13-6. 13-7 and 13-8, Your Honor.

This one consisting of two pages, but mark, for numbering, 13-9. 13-10. 13-11 and 13-12, Your Honor.

13-13. 13-14. 13-15. This one 13-16. 13-17.

Your Honor, apparently the clip has come off of this one. May I have it so marked?

The Court: Yes.

Mr. Smithson: 13-18, Your Honor.

13-19 consists of two cards to be known as 13-19.

13-20. 13-21. 13-22. 13-23. 13-24, and 5. 13-26. 13-27. 13-28. 13-29.

That's it, Your Honor.

(Accordingly, the Clerk marked the papers indicated by Mr. Smithson in the file which had been previously marked for identification as Government's Exhibit No. 13, as Government's Exhibit Number 13-1 to 13-29, inclusive, for identification.)

The Court: Let the record show that the papers which have now been marked 13-1 to——

Mr. Smithson: 29, Your Honor.

The Court: 13-29, inclusive, are marked as Governments exhibits, and are found in what has been marked for identification as Government's Exhibit Number 13.

[fol. 670] Mr. Smithson: Thank you, Your Honor.

The Court: All of these exhibits are marked for identification.

Mr. Smithson: Yes, Your Honor.

By Mr. Smithson:

Q. I show you Government's Exhibit 13-1 for identification, Lieutenant, and I'll ask you, what is this item?

A. It is a—

Mr. Smithson: Keep your voice up.

A. (continued) An attorney's visiting form, a standard form that we have in the institution whenever an attorney visits a client or inmate.

Q. Tell me, sir—

Mr. Carey: Your Honor, we have objection to any question about any of this exhibit at all. We have a general objection we register at this particular time.

Mr. Smithson: I believe it will be admissible, Your Honor, to show the level of intellect, and bearing on whether or not the defendant can read or write.

The Court: I think I'll have to see it.

Mr. Smithson: All right, Your Honor.

(The exhibit was handed to the Court.)

Mr. Carey: Before the Court rules, Your Honor, I'd like to be heard a moment, if you will permit me.

The Court: Yes. Mr. Carey, come to the bench then, [fol. 671] please.

(At the Bench:)

Mr. Carey: Your Honor, I'd like to make a motion for a mistrial, because the prosecutor, while standing alongside the witness, said that the record is being offered to show his intellectual level—

Mr. Smithson: I didn't say it was offered to show his intellectual level; I said it was offered to show his intelligence as to whether or not he can read or write.

Mr. Carey: I make the same objection.

The Court: You want to—



Mr. Smithson: His signature and certain other matters which will show his signature on letters he has written.

The Court: Speak of this one.

Mr. Smithson: Just his signature.

Mr. Carey: In fact, I'll tell you, we would be willing to stipulate that he can sign his name. We don't question that the man can sign his own name, if that's what you want.

It doesn't make him have an I.Q. of 140 or make him—if he signs his name to a paper.

The Court: You may inquire about where his mark is.

Mr. Smithson: It's up here. Your Honor, it's 13-1.

[fol. 672] (Indicating exhibit.)

The Court: Only with respect to the signature?

Mr. Smithson: The only thing I want to ask him to identify what the form was, Your Honor, and then whether or not that form bears any signature on it: the next question will be whether or not he recognizes that to be the signature of anyone.

Mr. Carey: First of all, speaking from experience, I worked around the coal mines as a young boy. Sometimes when one of the coal miners was injured and eligible for compensation, someone would say, "Sign your name there, John," on the form, and John would sign his name. The fact that he signed his name doesn't indicate that he understood what it was, the particular document. We have the same situation here. He's merely signed the document at the direction of somebody else.

Mr. Smithson: I don't think he signed the document at the direction of somebody else, because if counsel wants to make an issue of whether or not, we can go into the issue that at the jail, before an attorney may see a defendant, the defendant must consent to such interview, the same as with a police officer, as to whether or not he would have the ability to give such a consent.

There's a form in there where Captain Hartnett tried to talk to him, and he refused to see the Captain. I think he [fol. 673] had the right, the inherent ability—

Mr. Carey: I would use a less vigorous term and then say at the suggestion rather than direction, and still say he doesn't know what he was doing.

The Court: The objection is overruled. You may proceed.

Mr. Carey: We have another objection. I neglected to

mention this specific item to which my friend, the prosecutor, makes reference—an inquiry to his attorney, or what is it?

Mr. Smithson: No, it isn't that. It's: "I hereby request that Attorney Foster Wood be allowed to visit me at the D. C. jail on the following date, 4/2/53. Willie Lee Stewart."

Mr. Carey: Because that is a sacrosanct privilege, communication, which exists between an attorney and client, and we object to it on that point.

The Court: Objection overruled.

Mr. Carey: Thank you, Your Honor.

Mr. Smithson: Thank you, Your Honor.

(Counsel having returned to trial tables:)

By Mr. Smithson:

Q. Now, Lieutenant, what is this document, Government's Exhibit 13-1 for identification?

A. That is a standard attorney visiting form, that we [fol. 674] have for inmates to properly sign when their attorney visits them in the institution.

Q. Does there appear thereon a signature on the lefthand side, sir?

A. Yes, sir.

Q. Do you recognize that signature as being that of anyone?

A. That's to my knowledge, sir—

Mr. Carey: Objection—just a moment—

The Court: The question is, "Do you recognize it?"

The Witness: I beg your pardon, sir.

The Court: Not to your knowledge.

The Witness: I say yes. Yes, I recognize the signature.

Mr. Carey: I first should think the more basic inquiry is, did he see this man sign it; not does he know if it's his signature.

The Court: Objection overruled.

By Mr. Smithson:

Q. Do you or do you not recognize the signature, sir?

A. Yes, sir.

Q. As the signature of whom?

A. Willie Stewart.

Q. Is that the same Willie Stewart that you previously identified here?

[fol. 675] A. Yes, sir.

Mr. Carey: We'll stipulate that any reference to Willie Lee Stewart is to the defendant in this case.

Mr. Smithson: Do I understand then, counsel, that it is stipulated that this file does relate to the defendant, Willie Lee Stewart?

Mr. Carey: We'll stipulate that this file embraces allegedly certain things which occurred in the jail, and allegedly certain activities were those of the defendant, Willie Lee Stewart, who is being tried here.

Mr. Smithson: All right.

Mr. Carey: By that stipulation, we make no concession as to the accuracy of anything contained in this report.

Mr. Smithson: Understood.

By Mr. Smithson:

Q. Now, sir, I show you Government's Exhibit 13-2, 13-2, dated March 16, 1953; does there appear a signature on that on the lower righthand corner?

A. Yes, sir.

Q. And do you recognize that signature?

A. Yes, sir.

Q. Signature of whom?

A. Willie Stewart.

Q. All right. Likewise, sir, with the Exhibit 13-3—

Mr. Smithson: If counsel will bear with me a moment on the issue of the signature alone, will it be stipulated that I [fol. 675-a] might lead this witness whether or not this is the signature of the defendant?

Mr. Carey: You've been doing it right along. Why change now?

Mr. Smithson: All right. I'll go ahead.

By Mr. Smithson, continued:

Q. 13-3, do you recognize the signature?

A. Yes, sir.

Q. And the signature of whom?

A. Wait a minute. Willie Stewart.

The Court: Speak out.

Mr. Smithson: Keep your voice up.

The Witness: Willie Stewart. The reason why I hesitated, some are a little rougher than others to distinguish.

By Mr. Smithson:

Q. And, sir, showing you Government's Exhibit 13-4 and 13-5, do you see thereon the signature of the defendant, Willie Stewart?

A. Yes, sir.

Mr. Carey: Let me look at that a minute. I want to make some notes.

Mr. Smithson: Sure.

(Mr. Carey went to the witness stand and made some notes from the file.)

By Mr. Smithson:

[fol. 676] Q. For the record, sir, 13-4 and 13-5 are over what date?

A. June 2nd, 1953; June 17th, 1953.

Q. Likewise, sir, I show you Government's Exhibit 13-6, do you recognize the signature on the lefthand side?

A. Yes, sir.

Q. Signature of whom?

A. Willie Stewart.

Q. Over date of what?

A. July the 6th, 1953.

Q. Now, sir, going to this particular exhibit, known as Government Exhibit 13-7 for identification, do you see a signature on the lefthand side of this, sir?

A. Yes, sir.

Q. Whose signature is it?

A. Willie Stewart.

Q. Over what date, sir?

A. August 18th, 1953.

Q. And this, like the other forms, are what, sir?

A. Standard attorney visiting forms.

Q. I show you Government Exhibit 13-8, what is it?

A. Attorney visiting form.

Q. Do you recognize any signature on the lefthand side?

A. Yes, sir.

Q. Whose?

A. Willie Stewart.

[fol. 677] Q. Over what date?

A. August 24th, 1953.

Q. Now, sir, I show you Government Exhibit 13-9, consisting of two cards, sir. I'll ask you state what these cards are?

A. They are standard mail and visit cards that we keep on every inmate in the institution; shows mail sent and received, and visits that he has received.

Q. Now, sir with regard to the lower part of this first card, which reads, "Mail Record," I notice square running across the page, and two blocks over each, one above and one below, numbered here one zero, one zero, one zero, what does the block above relate to, or what does the block below relate to?

A. The top block represents the mail that he has received; the bottom block represents the mail he has sent.

Q. That the inmate has sent?

A. Yes, sir.

Q. And tell me, sir, for what person does 13-9 relate?

A. Willie Lee Stewart.

Q. And that's the same defendant that you have identified?

A. Yes, sir.

Q. Tell me, sir, does this record reflect whether or not the defendant, Willie Lee Stewart, sent out any mail, and, [fol. 678] if he did, for what period?

A. Yes, sir; it does. Month of April.

Q. Of what year?

A. Of 1953.

Q. All right.

A. He sent out in that month three letters, two to his wife, and one to his sister-in-law.

Q. All right.

A. In the month of October of the same year, he sent out two letters to his wife, and one to his sister-in-law.

Q. All right.

A. In November, he sent out one letter to his sister. December, he did not send any mail.

January, he did not send any: February or March.

In July—'54 now—doesn't have the date on it, but—up to January, then it comes to July, so I would assume that it's 1954—

(Indicating on exhibits.)

Mr. Carey: We are not going to allow you to assume, Mr. Witness.

By Mr. Smithson:

Q. What is your best estimate?

A. I would say 1954, would be the following month and year. July of 1954.

Q. What, if anything, does it indicate about mail being dispatched by the defendant?

[fol. 679] A. In July, he sent three letters out that month, two to his wife, and one to his sister-in-law.

Q. All right.

A. In August, he sent one to his wife and one to his sister-in-law.

September, he sent one to his wife.

In October, he sent one to his wife.

Q. I show you, sir, Government Exhibit 13-10. Do you see a signature on this, sir?

A. Yes, sir.

Q. Do you recognize that signature?

A. Yes, sir.

Q. Whose it it?

A. Willie Lee Stewart.

Q. What is this particular document?

A. This is a personal property release that we maintain for inmates, releasing property to any person that they may desire to.

Q. Is that dated, sir?

A. Yes, sir; October 20th, 1954.

Q. To whom was any property of the defendant released, if you know, from that form?

A. His wife, Annie Lee Stewart; released ten dollars to her.

Q. All right. I show you, sir, Government Exhibit—

[fol. 680] Mr. Smithson: Here's one, your Honor, that I skipped, or it wasn't numbered. May I have this given the next number?



The Court: Yes, that will be 30?

The Deputy Clerk: 13-30 for identification.

Mr. Smithson: Yes, Your Honor, 13-30.

(Accordingly, Government Exhibit 13-30, another item in the file previously marked for identification as Government Exhibit Number 30, was marked for identification.)

By Mr. Smithson:

Q. I show you 13-30, sir, for identification, and ask you to examine it, and state what it is?

Mr. Carey: 13 what?

Mr. Smithson: Dash 30.

A. It's a letter addressed to the superintendent.

Q. And do you recognize the writing in the signature, sir?

A. Yes, sir.

Q. Whose writing and signature is it?

A. Willie Stewart.

Q. All right, sir. Is the letter dated in any way, sir?

A. No, sir.

Q. Now, sir, the manner in which this material comes into this file, how does it get into this file?

A. A letter of that nature, going to the superintendent or [fol. 681] assistant superintendent, it isn't on a standard form, would be given to an officer, and he, in turn, would give it to the Captain or Lieutenant, who would read it first, screen it, ascertain the purpose of the letter. The Captain or Lieutenant would screen the letter first before passing it on.

Q. And, at what time, sir, would it get into his institutional file?

A. Well, if it came down in the morning, we'll say, for example, this morning, it would get in there sometime during this day.

Q. All right, sir. Now, the piece of material preceding 13-30 is dated what?

A. January 19th, 1955.

Q. And the piece of material following that is dated what?

A. April 28th, 1955.

Q. I show you, sir, Government Exhibit 13-11, what is this?

A. Sir, may I explain?

Q. Can you state what it is, Lieutenant?

A. I want to explain to you——

Mr. Carey: Answer the question.

Mr. Smithson: Just tell us what it is.

A. Standard interview form, that we maintain for inmates to gain an interview, a personal interview, with the head, [fol. 682] either the superintendent, assistant superintendent, a doctor, or the classification supervisor.

Q. Over what date is it, sir?

A. November 8th, 1954.

Q. Tell me, sir, is there a signature on it?

A. Yes, sir.

Q. Do you recognize the signature?

A. Willie Stewart.

Q. All right, sir. Now the name, Willie Stewart, is written how many times on that page?

A. Twice.

Q. All right, sir, with relation to the top one, do you recognize this or not to be the signature of the defendant?

A. Yes, sir.

Q. How about the bottom one, sir, do you recognize that to be or not to be?

A. No, sir; it's not the same writing.

Q. All right, sir. With regard to the message——

Mr. Ackerly: Your Honor, I didn't hear that last answer.

The Witness: It's not the same signature.

Mr. Ackerly: It's not the same?

The Witness: No, sir.

By Mr. Smithson:

Q. With regard to the message, sir, do you or do you not recognize it to be the writing of the defendant; Willie Lee Stewart?

[fol. 683] A. Yes, sir.

Q. Is it or is it not?

A. It is, sir.

Q. All right. I show you, sir, Government Exhibit 13-12, I'll ask you, what is this?

A. That's another property release form. Release of personal property.

Q. Over what date, sir?

A. January, 1955.

Q. And does it bear a signature?

A. Yes, sir.

Q. Whose?

A. Willie Stewart.

Q. And the purpose of this form is to do what?

A. Released ten dollars to his wife, Mrs. Stewart.

Q. All right, sir. And I show you, sir, Government Exhibit 13-13. What is this, sir?

A. That is another attorney visit form.

Q. Does it bear a signature on it?

A. Yes.

Q. Whose?

A. Willie Stewart.

Q. I notice, sir, like on this and certain others, there are certain initials under that name, what are those initials?

[fol. 684] A. Officer's initials.

Q. What is the purpose of the officer's initials there?

A. To certify that the man signed that form.

Q. All right, sir. Do you happen to recognize who certified that?

A. P. W. Jones, yes, sir.

Q. All right. Tell me, sir, I show you 13-14, is there a signature on there that you recognize?

A. Yes, sir.

Q. Whose is it?

A. Willie Stewart.

Q. I show you 13-15, what is this, sir?

A. Another attorney visit form.

Q. Over what date?

A. July 1st, 1955.

Q. And do you find the defendant's signature on this form?

A. Yes, sir.

Q. All right. I show you Government Exhibit 13-16, what is this, sir?

A. It's another letter, addressed to the superintendent.



Q. And do you recognize the handwriting, sir?

A. Yes, sir.

Q. Whose is it?

A. Willie Stewart's.

[fol. 685] Q. Do you recognize this signature?

A. Yes, sir.

Q. Whose is that?

A. Willie Stewart.

Q. I'll ask you, sir: This writing in the bottom in blue, do you recognize that writing?

A. Yes, sir.

Q. Is that the writing of the defendant, that which is in blue?

A. No, sir.

Q. Whose writing is that, if you know, sir?

A. It's Mr. George Stokes, the Assistant Superintendent.

Q. Would you keep your voice up.

A. Mr. George Stokes, the Assistant Superintendent.

Q. All right, sir. I'll ask you, sir, if you recognize the writing contained in the body of this message?

A. Yes, sir.

Q. And whose writing?

A. Willie Stewart.

Q. I show you Government Exhibit 13-17, sir. What is this?

A. It's another one of our mailing and visiting cards.

Q. All right, sir. And relates to what defendant?

A. Willie Stewart.

Q. And does it indicate, sir, whether or not the defendant [fol. 686] dispatched any mail during the period covered by those cards?

A. Yes, sir.

Q. Keep your voice up, Lieutenant—

A. Yes, it does.

Q. Tell us for what period of time what letters were sent out by the defendant?

A. May I remove these papers?

Q. Yes?

(Indicating the file.)

A. It is the year of 1955 and 1956.

Q. All right, sir. What, if any, indication—or what do the records reveal, not indication, as to whether or not the defendant dispatched any mail during that period of time?

A. October, he sent four letters out, all four to his wife.

Q. That's October of 1955 or six?

A. '55.

Q. All right. Go ahead, Lieutenant.

A. November, he mailed five letters out to his sister-in-law in the month of November, and two to his wife.

Q. All right, sir.

A. December, he sent out three letters to his sister-in-law, three letters to his wife, and one to his sister.

[fol. 687] Q. All right.

A. January, he sent three letters—beg pardon, sir—that's 1956 and '57.

Q. All right.

Mr. Carey: So you were wrong in that?

Mr. Smithson: The date was wrong, is that correct?

The Witness: The date is barely—I can hardly read it—I had to look at it again.

January, sent one—two—three letters to his wife, and three letters to his sister-in-law.

February, two letters to his wife, one to his sister-in-law, and one to his sister.

And March, sent two to his wife.

Mr. Smithson: All right, sir.

The Court: That will be all for now.

Gentlemen, the Court will be in executive session at one o'clock. I hope to be here at two.

So, I'll ask the jury to keep in mind the admonition. You will be excused. Be back promptly at two o'clock.

Mr. Carey: Your Honor, I wonder if we may have that exhibit during the recess. It will save time.

The Court: Yes.

Mr. Smithson: I certainly have no objection. I believe they should have it, and maybe we can proceed with it, Your Honor.

[fol. 688] The Court: I think so. If you'll turn it over to them.

Mr. Smithson: The lieutenant is charged with the custody of it. He would have to remain with it, if counsel does not object.

Mr. Carey: I think we're responsible people.

Mr. Smithson: I understand that, counsel, I understand that.

Mr. Carey: I understand if the Court directs——

Mr. Smithson: If the Court will so direct him. That's the point, counsel, so that he is relieved of the responsibility.

The Court: The Court will relieve you of that responsibility. I'll take it.

The Witness: Thank you.

The Court: Turn it over to counsel for the defendant.

Mr. Smithson: Yes, Your Honor.

The Court: The jury will be excused.

(Accordingly, at 12:30 p.m., the Court recessed until 2:00 o'clock p.m.)

[fol. 689]

#### AFTERNOON SESSION

(Whereupon the hearing reconvened at 2:10 p.m.)

The Court: We had a witness on the stand, gentlemen.

Mr. Smithson: Lieutenant Depro, Your Honor.

The Marshal: I will have him in in just a minute, Your Honor, after they bring the Defendant out. Whereupon——  
Honor, after they bring the Defendant out.

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Whereupon—ROBERT M. DEPRO resumed the stand and testified as follows:

The Court: I will return in a moment.

(Whereupon the hearing was in recess.)

The Court: Mr. Smithson.

Mr. Smithson: Shall I proceed?

The Court: Are we prepared to go ahead?

Mr. Smithson: Yes, Your Honor.

#### Direct examination (Cont'd):

By Mr. Smithson:

Q. Lieutenant, I admonish you again, please, to keep your voice up so that each member of the Jury may hear you.



I show you Government Exhibit 13-18. I will ask you, sir, do you recognize the signature on this document?

A. No, sir, I don't recognize that one.

Q. Do you recognize any of the writing on it, sir?

A. No, sir.

Mr. Carey: Let the record reflect he shook his head, no.  
[fol. 690] Mr. Smithson: Agreed, counsel.

By Mr. Smithson:

Q. You do not recognize the writing or the signature?

A. No, sir.

The Court: What exhibit number is that?

Mr. Smithson: No. 13-18, Your Honor.

By Mr. Smithson:

Q. I show you Exhibit 13-19, sir. I will ask you to state what this record is?

A. That is another mail and visit record, institutional mail, and visit record.

Q. Is that similar to the exhibit which you previously identified as 13-17?

A. Yes, sir.

Q. I will ask you, sir, if that indicates—and if it does, what months—whether or not the Defendant sent any mail out to any of his relatives or anyone else?

A. Yes, sir.

Q. For what date and what period, sir?

A. October, November, December of 1957.

Q. And does it indicate, sir, to whom he mailed any of this matter?

A. Yes, sir.

Q. To whom?

[fol. 691] A. Month of October, mailed three letters out to his wife, and two letters to his sister-in-law.

Q. All right.

A. Month of November, he mailed three letters to his sister-in-law and one letter to his wife.

Month of December, he mailed three letters to his wife and one to his sister-in-law.

Q. All right, sir.

Sir, I show you Government Exhibit 13-20, for identification. I will ask you, sir, to state what that item is?

A. It is a standard request form that we have for inmates to use when they want to request a particular interview or particular item from either the Superintendent, Assistant Superintendent, doctor or classification officer.

Q. Do you recognize the writing, signature or both, Mr. Depro?

A. Yes, sir.

Mr. Carey: Recognize what?

By Mr. Smithson:

Q. Which is it you recognize?

A. The writing.

Q. You recognize the writing?

A. Yes, sir.

Q. How about the signature?

A. The signature, I don't recognize.

[fol. 692] The Court: I can't hear you.

By Mr. Smithson:

Q. Keep your voice up.

A. The signature, I don't recognize.

Q. You do recognize the writing; is that so?

A. Yes, sir.

Q. As whose writing?

A. As Willie Stewart's.

Q. All right. I show you, sir, Government Exhibit 13-21. Do you recognize the writing or the signature on that, sir?

A. No, sir, I don't recognize either the writing or the signature.

Q. All right, sir.

The Court: Is that 21?

Mr. Smithson: Twenty-one, Your Honor.

By Mr. Smithson:

Q. I show you, sir, Government Exhibit 13-22. Do you recognize the signature or writing on that?

A. Yes, sir, I can recognize the writing.

Q. All right, sir. Whose writing?

A. Willie Stewart's.

Q. Now, this Exhibit, sir, 13-22 and 13-20, what are these two documents, sir?

A. They are both request forms.

[fol. 693] Q. All right, sir. Similar to that which you just described?

A. Yes, sir.

Q. I show you, sir, Government Exhibit 13-23. Do you recognize the signature or the writing on that?

A. Recognize the writing.

Q. All right, sir. Whose writing?

A. Willie Stewart's.

Q. What is this form, sir?

A. Another one of the request forms.

Q. All right.

I show you this particular document, 13-24, sir. Do you recognize the signature or the writing on that?

A. Yes, sir, I recognize the writing.

Q. And whose writing?

A. Willie Stewart's.

Q. What is the form?

A. Another one of the standard request forms, sir.

Q. I show you, sir, 13-25. Do you recognize the signature or writing on that?

A. Yes, sir, I recognize the writing.

Q. Tell me, sir, there is some writing here in blue. Do you recognize that writing as the Defendant's or not?

A. No, that is not the Defendant's writing.

Q. All right, sir. I show you, sir, Exhibit 13-26. I will [fol. 694] ask you to examine that and state whether or not you recognize the signature or the writing?

A. I recognize the writing, sir.

Q. All right, sir. Whose writing?

A. Willie Stewart's.

Q. What is the form?

A. Standard request form, sir.

Q. I show you 13-27, sir. Do you recognize the writing or the signature?

A. I recognize the writing, sir.

Q. Whose writing?

A. Willie Stewart's.

Q. Is that a standard request form?

A. Another standard request form, yes, sir.

Q. I show you sir, Government Exhibit 13-28. I will ask you if you recognize the signature or the writing?

A. The writing again, sir, I recognize.

Q. All right. Whose writing?

A. Willie Stewart's.

Q. Is it a request form?

A. Another request form.

Q. I show you, sir, Government Exhibit 13-29. I will ask you whether or not you recognize the writing or the signature?

A. I recognize the writing on that also, sir.

Q. Tell me, sir, this name up here, do you recognize that [fol. 695] at all?

A. No, sir.

Q. All right. The writing which you have recognized, whose writing is that?

A. Willie Stewart's.

Q. What is this form?

A. That is a standard request form, sir.

Mr. Smithson: I think we earlier covered 13-30.

Would Your Honor indulge me just a moment?

The Court: Yes.

Mr. Smithson: Your Honor, the Government offers the Exhibits 13-1 through 13-30, with the limitation on those beginning with 13-20 as to the writing alone and not the signature as that of the Defendant Willie Lee Stewart.

The Court: How about 13-18?

Mr. Smithson: I thought that one—I am not certain. May I check that one, Your Honor.

No. 13-18, Your Honor, was identified, it is my recollection, as that of the Defendant.

Mr. Ackerly: It is not in my notes, Your Honor.

Mr. Smithson: I will ask the witness again to make sure, Your Honor.

The Court: Yes, clarify that. I understood to the contrary.

Mr. Smithson: If you did, I will accept that.

[fol. 696] By Mr. Smithson:

Q. The signature on 13-18, do you or do you not recognize it, sir? The signature at the bottom.

A. Yes, sir, I recognize that.

Mr. Carey: You recognize that, you say?

The Witness: Yes, I recognize that one.

Mr. Carey: That isn't what you said before.

The Witness: That wasn't 13-18, if I am correct, sir.

Mr. Carey: 13-18, you said you did not identify.

The Court: Don't argue with the witness.

Mr. Ackerly: I am not arguing, Your Honor.

Mr. Smithson: The witness says it was one further on.  
May he look at the rest of the file, Your Honor?

The witness said something, Your Honor.

Would you keep your voice up?

The Witness: The one number 13-16 is the one that I identified.

By Mr. Smithson:

Q. Is the one you identified, sir?

A. Yes, sir.

Q. What about 13-18, sir? Can you or can you not identify it?

A. No, sir, I can't.

The Court: I didn't hear him answer. He didn't answer.

The Witness: No, sir, I cannot identify that.

[fol. 697] The Court: That is 13-18.

Mr. Carey: Now he is being consistent.

Mr. Smithson: May I ask that those remarks be stricken, Your Honor, we don't need that.

The Court: No; that will go out.

By Mr. Smithson:

Q. Will you look at the writing on 13-18, please. I will ask you whether or not you can identify the writing, sir?

A. No, sir.

Q. You cannot identify the writing of 13-18?

A. No, sir.

Mr. Carey: Objection; it is repetitious.

The Court: The answer may stand.

Mr. Smithson: I will omit the offer of 13-18, Your Honor.  
I again offer the exhibits.

The Court: Now, your offer relates to 13-1 through 13-30 with exceptions?

Mr. Smithson: With the exceptions.

The Court: State the exceptions.

Mr. Smithson: The exception would be, Your Honor, 13-18, and 13-20 as to signature alone. The witness having identified the message or the writing on the others, beginning with 13-20, but not the signature.

The Court: Then you exclude from your offer 13-18 and [fol. 698] 13-20?

Mr. Smithson: No. 13-20 as to the signature. And there were others after 13-20 as to signature, Your Honor. Beginning with 13-20, the witness recognized the message or the writing, but not the signature on the document.

Mr. Carey: Your Honor—

The Court: Well, then, if I understand you, the only exhibit which you exclude from the offer is 13-18.

Mr. Smithson: That is correct, in toto, Your Honor. I am excluding that in toto.

The Court: Yes.

Mr. Smithson: Entirely.

The Court: But still you don't quite answer my question.

Mr. Smithson: I am sorry, Your Honor.

The Court: The only exception which you make to the whole 13-1 to 13-30 is 13-18?

Mr. Smithson: That is my recollection, yes, Your Honor.

The Court: That is the offer.

Mr. Carey: Your Honor, I am going to help the prosecutor. I am a great man to help my opponent. No. 13-21, my notes indicate there was no identification, too. In order to keep this record straight, you had better look at 13-21.

Mr. Smithson: Gladly, if I may.

[fol. 699] Mr. Carey: I don't want to confuse anybody.

The Court: All right.

Mr. Smithson: May I proceed, Your Honor?

The Court: Yes.

By Mr. Smithson:

Q. Do you recognize, Lieutenant Depro, either the writing or the signature on 13-20?

A. Yes, sir, I recognize the writing.

Q. And not the signature?

A. No, sir.

Q. I believe that was in conformity—

The Court: He is talking about 21.

Mr. Smithson: Twenty-one? I am sorry.



Mr. Carey: Twenty-one.

Mr. Smithson: I am sorry.

By Mr. Smithson:

Q. I show you, sir, Government Exhibit 13-21. Do you recognize the writing or the signature?

A. No, sir, I don't recognize either one.

Mr. Smithson: The Government will eliminate the offer of 13-21, Your Honor.

Mr. Carey: I think I am entitled to a "thank you" for that one. I am helping the prosecutor on that.

The Court: Yes. You may proceed.

Mr. Smithson: All right, Your Honor. The offer is still [fol. 700] made for those exhibits.

Mr. Carey: You offer them in evidence?

Mr. Smithson: They have been offered, counsel.

Mr. Carey: We register the objections heretofore made at the bench and from the floor, Your Honor. We fail to see any basis for their admissibility at all.

Mr. Smithson: I believe we have gone into that at the bench, Your Honor.

The Court: The objections are overruled. Government's Exhibits 13-1 through 13-30, excluding 13-18 and 13-21, are received.

(Whereupon Government's Exhibits 13-1 through 13-30, excluding 13-18 and 13-21, were received in evidence.)

Mr. Smithson: Thank you, Your Honor.

With the permission of the Court, may I read those to the Jury?

The Court: Yes. However—

Mr. Carey: Don't the records speak for themselves, Your Honor?

The Court: It appears to the Court that the Jury will not be concerned or interested in the contents. What they will be interested in is seeing the signatures and the writing.

Mr. Smithson: That is understandable, Your Honor. The only point is that this is a complete record. I hesitated to [fol. 701] take those out. If I may remove them—

The Court: I see no escape from it.

Mr. Smithson: All right, Your Honor.

Mr. Carey: Your Honor, here is the thing that perplexes me, and I am easily perplexed. How is he going to read? He has already identified the signature of Willie Lee Stewart. He is not to read the contents. How can the Jury look at a signature on this paper this size without reading the contents?

The Court: Well, the Jury are told that with respect to these exhibits, 13-1 through 13-30, excluding 13-18 and 13-21, they are only viewable by the Jury as to the signature and the writing other than the signature identified as the signature or the writing of this Defendant. You are not concerned with the contents of the writing, the purport of the writing.

Mr. Smithson: All right, Your Honor.

Mr. Carey: Your Honor, I will tell you another suggestion I have. I am getting worried about myself this afternoon. I am making so many proffers to the prosecutor.

I would suggest, without waiving the objections on the part of the Defendant to the admissibility of this document, that the Jury be allowed to look at the entire document.

The Court: It is not in evidence. They can't do that.

Mr. Smithson: Your Honor—

[fol 702] Mr. Carey: I solicit that offer from the prosecutor.

Mr. Smithson: May it please the Court, I would have no objection to the offer, provided that counsel realizes what he is conceding on this matter. I am not sure counsel realizes everything that is contained in this file.

Mr. Carey: I have gotten along for five days being aware of everything going on in the courtroom. I don't need worry from the prosecutor.

Mr. Smithson: I think I should make a statement at the bench, Your Honor. Counsel has expressed some concern about certain aspects.

(Whereupon counsel approached the bench and the following proceedings were held out of the hearing of the Jury:)

Mr. Smithson: Your Honor, I am perfectly content for this entire file to go in. However, it shows in this file that the Defendant was confined, following his first verdict of, guilty, in the MSR range, which is maximum security, on a verdict of, guilty, of the jury, of the crime of first degree murder.

Mr. Carey: I see no objection to that. They already know he has been tried several times.

Mr. Smithson: I agree with you, but I want to make sure we made it a matter of the record what was contained in there.

Mr. Carey: However, I want to make clear I am not [fol 703] waiving my objection to the admissibility of this document. Just to expedite matters.

The Court: I can't send it to the Jury under your objection.

Mr. Carey: All right.

The Court: Because I think there are matters in there where your objection is good.

Mr. Carey: Thank you, Your Honor.

The Court: I think you will have to separate them.

Mr. Smithson: All right, Your Honor.

(Whereupon counsel resumed their places at the trial table and the following proceedings were held in open Court:)

The Court: You may do that later.

Mr. Smithson: I think so, Your Honor.

The Court: And at a later time, exhibit them to the Jury.

By Mr. Smithson:

Q. Lieutenant, I will ask you, during the course of your observation of the Defendant Willie Lee Stewart while he was in your custody or the custody of your institution, if you had occasion to observe him reading anything?

A. Well, at times when I would pass his cell, he would be seated at the desk—small desk we have in the cell—have a book open and be looking at it. Indicate to me that he was reading. Particularly one book was a Bible.

[fol. 704] Q. All right, sir.

Now, tell me, sir, have you ever had any discussion with the Defendant regarding work?

Mr. Carey: I object to that unless we pinpoint the time and the place.

Mr. Smithson: I will attempt to do so.

Mr. Carey: First.

By Mr. Smithson:

Q. Can you recall, sir, if you had any such discussion, the date of it, with regard to any work at your institution?

A. Approximately two, three months ago.

Q. All right, sir.

Mr. Carey: Objection to any questions involving within the immediate period, Your Honor. We are trying this man for a crime allegedly occurred in March of 1953.

Mr. Smithson: I believe Your Honor knows the reason of the proffer of the Government's testimony at this time in that regard, I think it is admissible.

The Court: Yes. Stay within that limit.

Mr. Smithson: All right, Your Honor.

By Mr. Smithson:

Q. Now, sir, what conversation did you have with him with regard to working on those premises?

A. Well, after Stewart had been put in the general population, he asked if we couldn't—asked me if I couldn't find [fol. 705] something for him to do within the cellblock to occupy his time, make the time go by faster, or help make it go by faster.

Q. Tell me, sir, did you make any effort to do that?

A. I instructed the sergeant in charge of the cellblock to put him on what we refer to as block detail, find a job in the block detail for him.

Q. Have you had occasion, sir, at any time, to see him perform any of the work on the block or tier, or whatever it was?

A. Yes, sir, numerous times.

Q. What could he do?

Mr. Carey: Objection unless we pinpoint the time.

By Mr. Smithson:

Q. Your best estimate of the time, sir?

A. Oh, from 1953 on up to the last couple of months, couple, three months.

Q. All right, sir. What if any work did he do?

A. Prior to that time, very little, as far as actual work, labor. Each man would take his turn as a tierman, you

might say. We refer to it as tierman on a range of cells—sweep down the range, and pass the implements for the cleaning from one cell to another.

Q. You said two or three months ago, though, he did something else. What was that? What has he done in the [fol. 706] last two or three months?

A. In the past two or three months, is that what you mean, sir?

Mr. Carey: Objection. I don't recall that.

The Witness: In the past two or three months, he has been a block painter. We have a paint gang in the cellblock and he has been one of the members of that paint gang, painting the block, keeping the paint work up.

By Mr. Smithson:

Q. How often is that done, sir?

A. That is a round-the-clock operation, you might say, as far as during the daylight hours. Cellblocks are so large; and to try and keep as many of the men occupied as we can, we start at one end of the block, and by the time we get to the other end, it is time to start back at the other end.

Q. All right, sir. Is this a daily matter?

A. Daily operation, yes, sir.

Q. Have you ever had any occasion to talk with the Defendant regarding his family or any of his children?

A. Well—

Mr. Carey: Let's have the time, again, Your Honor, please.

By Mr. Smithson:

Q. Can you establish the time, Lieutenant?  
[fol. 707] A. Fifty-six or '57. Within the last two years. I will put it that way.

Q. What was the occasion, sir, and what if any conversation did you have with him?

A. His boy was right sick at D. C. General Hospital and Stewart was pretty upset about it, and had directed a request to the wellbeing of his son and his health at that time, his status.

Q. Tell us what was said or done by him and what you replied to him?

A. He asked me that morning, said: Lieutenant, if you could get a phone call or have a phone call made for me at D. C. General Hospital, find out how my boy is.

That is the best of my recollection. That was just about it.

Q. Do you know of your own knowledge whether or not the Defendant ever went to see his boy over there?

A. Yes, sir, he was taken over in custody of the jail officers and saw his son.

Q. All right, sir. Now, did you ever have any conversation with the Defendant regarding any requests to see or speak with his wife or anything in that regard?

A. Yes, sir.

Q. When was it as best you can recall?

A. Sir?

[fol. 708] Q. When was it as best you can recall?

A. Within the last year, year and a half.

Q. All right, sir. What were the nature of the requests?

A. His wife had been removed from his mail and visiting list and he wanted me to intercede with Mr. Stokes in getting her replaced on the list.

Q. All right, sir. Did you ever have any conversation with the Defendant relative to his physical condition or the care of himself.

A. Yes, sir.

Q. What was the date, as best you can recall it, and what was the conversation?

A. Back in '55, '56, Willie was suffering with right bad fungus condition of his feet, and I would have to take him periodically—when I was on duty at times, I would escort him over to the doctor's office for examination and treatment of his feet; and part of the treatment that the doctor prescribed was that he soak his feet in hot water and Epsom Salts; and Willie would be given a bag of Epsom salts to use during the course of the day. And when he would run out of it, he would tell me: Lieutenant, I am out of Epsom salts. And I would see that he got another quantity to carry him for the period of time for the soaks.

Q. Pardon me, Lieutenant, I didn't mean to interrupt you. Go ahead.

[fol. 709] A. That is all right, sir.



Q. Tell me, Lieutenant, do you of your own knowledge know whether or not the Defendant was ever concerned about his weight?

A. Yes, sir.

Mr. Carey: Objection, Your Honor.

Mr. Smithson: Hold it.

Mr. Carey: Wait a minute, when I object.

I object to that, Your Honor. He says, was the Defendant ever concerned about his weight.

The Court: Objection sustained.

Mr. Smithson: I believe, Your Honor, I would like to make a proffer of that, and I would like Your Honor to hear it.

The Court: Very well, come to the bench.

Mr. Carey: I have no objection to the question if it is framed properly. I am objecting to the leading aspect of it.

The Court: Perhaps you can reframe your question.

Mr. Smithson: Gladly, Your Honor.

Mr. Carey: I am easy to get along with.

By Mr. Smithson:

Q. Lieutenant, have you ever weighed the Defendant or seen him weighed?

A. Yes, sir.

[fol. 710] Q. Who did it?

A. The Defendant himself would manipulate the scale.

Q. When was this, if you recall?

A. Practically every time we went over to the doctor's office, about once a week.

Q. You say, manipulate the scales. What do you mean by that, Lieutenant?

A. Well, institutional scales, standard-type scales where you have the heavy weight for the pounds and ounces, the larger one running from 50 to 200 or 300 pounds, the bottom scale, and the top bar—sliding—regular hospital-type scale.

Q. Who would make the adjustment on that scale while he was weighing?

A. Stewart, himself, would.

Q. All right. Tell me, sir, at any time while the Defendant has been in your custody, at any time, have you ever

received any complaints from any of the other inmates as to his talk or actions?

Mr. Carey: Objection to that.

Mr. Smithson: I think it is perfectly proper.

Mr. Carey: Hearsay, Your Honor, obviously hearsay.

Mr. Smithson: Not what was said, but whether or not the fact of a complaint had been received.

Mr. Carey: A complaint connotes conversation, would [fol. 711] suggest hearsay.

The Court: Objection sustained.

Mr. Smithson: All right, Your Honor.

By Mr. Smithson:

Q. Tell me, sir, based on your experience at St. Elizabeth's Hospital, have you ever had occasion to observe people suffering from hallucinations?

A. Yes, sir.

Q. At any time, sir, during the time that Willie Lee Stewart was in your custody, has he ever expressed to you that he talked with anyone?

A. No, sir.

Q. Did he ever tell you, sir, he talked with God?

A. No, sir.

Q. Did he ever tell you, sir, he was a master?

A. No, sir.

Mr. Smithson: I think that is all of this witness, Your Honor.

### Cross-examination

By Mr. Carey:

Q. Lieutenant Depro, you identified Willie Lee Stewart's signature on, oh, maybe fifteen to twenty pages; is that correct?

A. Yes, sir.

Q. You further identified his signature as being affixed to [fol. 712] a standard form; is that correct?

A. Yes, sir.

Q. By a standard form, you mean a form that has been printed by the Government Printing Office or some mimeograph machine; is that correct?

A. That is right, sir.

Q. In other words, the form was filled out with the exception of Stewart putting his signature on there?

A. Yes, sir.

Q. So all he had to do was take a pen or pencil and write, "Willie Lee Stewart"?

A. Yes, sir.

Q. He didn't have to write anything else; did he?

A. No, sir.

Q. If Willie Lee Stewart says to you, as one of the officials of the D. C. Jail: I would like to visit my wife or would like to have my wife visit me—you bring a form down to him; don't you?

A. A form is given to him, yes, sir.

Q. The form is prepared and you say: All right, you put your name there if you want to see your wife. Is that correct?

A. No, sir.

Q. How do you do it?

A. He takes the request form. He writes on there what—[fol. 713] ever the nature of the request. For instance, if he wants to see his wife—I would like to have permission to visit my wife or have my wife visit me.

Q. Does he write down: I would like to have permission? Does he have to do that?

A. Yes, sir.

Q. Isn't that on the form?

A. On some of those forms.

Q. In other words, that writing is on the form at the time you give it to him?

A. No, sir.

Q. It isn't?

A. No, sir; he writes it in himself.

Q. How many men are in the cellblock with him?

A. Sir?

Q. How many men are in the cellblock with him?

A. How many prisoners?

Q. Yes.

A. Oh, it varies, 200, 250, 260, maybe.

Q. If he gets a form, he can hand it to somebody else to fill out; isn't that correct?

A. That is possible.

Q. That is customary in the jail; is it not?

A. No, sir.

Q. What?

[fol. 714] A. No, sir.

Q. It is not?

A. Not always.

Q. On many occasions, is it not true that a prisoner has somebody else fill out a form for him and he merely signs his name? Isn't that true?

A. Not always.

Q. I said, on many occasions.

A. It is possible.

Q. I said, on many occasions, isn't that correct?

A. Not on many occasions, on some occasions.

Q. On occasions?

A. Yes, sir.

Q. It is not unusual for another prisoner to fill out a form and send it to Court; isn't that true?

A. That is.

Q. You don't see Willie Lee Stewart every time he signs his name to these various documents; do you?

A. Not every time, no sir.

Q. You hand it to him and you pick it up later; is that correct?

A. That is right, sir.

Q. How that form is filled out, you don't know?

A. That is correct.

Q. All you have done here today is identify his signature [fol. 715] on a specific form; isn't that correct?

A. Yes, sir.

Q. Whether Willie Lee Stewart, his cellmate or his companion filled it out, you don't know? Yes or no?

A. Yes, sir.

Mr. Smithson: Yes, sir, you do know or, yes, you don't know?

The Witness: Yes, I do.

Mr. Carey: Please, that is cross examination. You can take it on later.

Mr. Smithson: I don't believe the answer was altogether clear.

Mr. Carey: It is clear to me.

Mr. Smithson: May I have the witness explain the answer, if he can, Your Honor?

Mr. Carey: I am not asking him to explain an answer.  
 The Court: Keep in in mind. You may later inquire.  
 Mr. Smithson: All right, Your Honor.

By Mr. Carey:

Q. I will show you the first form you were allowed to look at by the prosecutor.

The Court: What exhibit number?

Mr. Carey: I am going to identify it now, Your Honor.  
 Government Exhibit 13-1.

[fol. 716] By Mr. Carey:

Q. Now, in print it says, "Department of Corrections, District of Columbia Jail," is that correct?

A. Yes, sir.

Q. That is official printing; isn't it?

A. Yes, sir.

Q. And it says, "Attorney visit request." That is official printing; is it not?

A. Yes, sir.

Q. "The Resident Superintendent, Department of Corrections, D. C. Jail, 200 19th Street, S. E., Washington 3, D. C., Dear Sir." That is official Government printing; isn't it?

A. No, sir, not official Government printing. Done in the institution.

Q. Done by you people. Willie Lee Stewart has nothing to do with that?

A. That is right.

Q. "I hereby request that Attorney blank"—that is official, prepared by you people; is it not?

A. Yes.

Q. Then there is a blank for the name he wishes to see. It has the name, "Foster Wood" on there. Is that name "Foster Wood" written by Willie Lee Stewart or somebody else?

[fol. 717] A. Written by Foster Wood.

Q. It is not written by Willie Lee Stewart; is that correct?

A. That is right.

Q. It further says: "... be allowed to visit me at the D. C. Jail on the following date."

That is official printing; is it not?

A. Yes, sir.

Q. Down here you have a date, April 2, 1953:

So there were two places so far where the prisoner or somebody who is his agent has to insert writing; is that correct?

A. Yes, sir.

Q. The name of the person whom he wishes to see and the date; is that correct?

A. Right, sir.

Q. Now, this number here, 77256-C32, that is done by someone in Jail; is it not?

A. Yes, sir.

Q. That is the identification of the prisoner?

A. That is his number.

Q. This here, you say, is Willie Lee Stewart's signature?

A. Yes, sir.

Q. Further down it says:

[fol. 718] "The Resident Superintendent of Corrections, D. C. Jail, Washington 3, D. C. Sir."

That is official printing done by the Jail; is that correct?

Q. "Sir: I, the undersigned, a regular practicing attorney, member of the Bar of the State of D. C. hereby request that I be allowed to visit blank ..." the person whom he wishes to see "... for the following purpose."

So that entire form which you were asked about, the only time that Stewart has to do anything is where he signs his name at the bottom; isn't that correct?

A. The middle part of it.

Q. So it is a standard form and very little if any effort other than signing your signature; is that correct?

A. Yes, sir.

Q. That applies to Government Exhibit 13-2; doesn't it?

A. May I look at 13-2?

Q. Yes, indeed, you may look at the whole exhibit.

A. That is right, sir.

Q. That also applies to Government Exhibit 13-3? All that is required is his signature; isn't that right?

A. Yes, sir.



Q. That is all that is required of Government Exhibit [fol. 719] 13-4; isn't that correct?

A. Yes, sir.

Q. That is all that is required in 13-5; isn't that correct?

A. Yes, sir.

Q. That is all that is required in Government's Exhibit 13-6; isn't that correct?

A. Yes, sir.

Q. That is all that is required in Government Exhibit 13-7; isn't that correct?

A. Yes, sir.

Q. That is all that is required in Government's Exhibit 13-8; isn't that correct?

A. Yes, sir.

Q. Now, Government's Exhibit 13-9, Lieutenant Depro, is a record kept by somebody in the jail; isn't that correct?

A. Kept by the mail and visit office.

Q. That is somebody other than Willie Lee Stewart?

A. Yes, sir.

Q. It is kept by one of the clerical help employed at the D. C. Jail; is that correct?

A. Kept by a correctional officer.

Q. A correctional officer. So if he gets a letter from his wife or he sends a letter to his wife, this man records it mathematically—twice he got letters from his wife—is that [fol. 720] correct?

A. Every time a letter is sent or received, yes, sir.

Q. So these figures that you were quoting to the Court and Jury, twice he wrote to his wife, three times to his sister-in-law, three letters he got from his wife, that work is not done by Willie Lee Stewart; is it?

A. You mean the recording?

Q. That is right.

A. No, sir. That is official records. No inmate is allowed to touch it.

Q. You don't know who wrote these letters. All you are relying on is this bookkeeping record; isn't that correct?

A. If I may say so, sir, I said the letters were sent or received. I didn't say anybody wrote them. Our records show that they were sent or received.

Q. I don't want you to mislead the Jury. What you have is a statistical record, a mathematical computation of the

number of communications sent by Stewart and received by Stewart?

A. That is correct.

Mr. Smithson: I would ask that the remark about the witness misleading the Jury be stricken.

The Court: Yes.

Mr. Carey: I apologize. I never indicated it was a purposeful misleading. All I meant was, I didn't want the Jury misled.

By Mr. Carey:

Q. So all you are reading from there is that Stewart received mail and who sent mail?

A. Yes, sir.

Q. Who signed those letters, who wrote those letters for Stewart, you don't know?

A. That is right.

Q. That could have been written by a cellmate; isn't that correct?

A. Yes, sir.

Q. That is correct.

Excuse me a moment, Lieutenant.

I show you here, Lieutenant, a letter that says:

"I would like to know if I could get some kind of job while in the block because I have been here for a long time now, and I have not made any trouble for anyone. Thank you. Willie Lee Stewart."

That was no written by Willie Lee Stewart; was it?

A. No, sir.

Q. What?

A. No, sir.

Q. It was written by somebody else?

A. (Witness nods assent.)

[fol. 722] Q. Nothing unusual about that?

A. That is right.

Mr. Carey: Excuse me, Your Honor. I have a little trouble finding what I wish.

The Court: Yes.

By Mr. Carey:

Q. I think you identified, too, Government Exhibit 13-20 was a standard form, is that correct, Lieutenant Depro?

A. Yes, sir.

Q. Government Exhibit 13-22 is a request form, is it not, which is standard?

A. Yes, sir.

Q. 13-23 is a standard request form; is it not?

A. Yes, sir.

Q. 13-24, Government Exhibit, is also a standard form; is it not?

A. Yes, sir.

Q. 13-25, 13-26, 13-27, 13-28 and 13-29 are all standard forms used by the inmates of the jail; are they not?

A. Yes, sir.

Q. So all he had to do in all of those forms I have just asked you about is write his name; is that correct?

A. No, sir.

Q. What else did he have to do?

A. He has to write the body of the message in these particular forms.

Q. Those things I asked you, the name of the person and the name; is that correct?

He has to fill in his request, whatever he desires. Whatever point or whatever he wants to get across has to go on these particular forms. These are administrative forms No. 23. They are blank, all in its entirety until the inmate gets it. He puts his name, his cellblock location, his cell number, his D. C. D. C. number, and writes the body of the message on there.

Q. Well, read this one here. This is one of the forms that was offered in evidence.

Am I reading it correctly?

"Dear Mr. Stokes:

"I am request you again to see you personal for myself. O. K., sir."

A. Yes, sir. That is written by the inmate.

Q. How do you know it is written by the inmate?

A. I said, the inmate. I didn't say any particular inmate.

Q. You have no personal knowledge who wrote that; do you?

A. Not that particular one.

Q. That is right. So a lot of these forms that you say the inmate has to put certain information in could have been [fol. 724] put in by somebody else as far as you know; is that correct?

A. Possible, yes, sir.

Q. And it is highly probable, too; is it not?

A. But there are some of these forms I have stated I know myself that was written by the man because I stood right in front of his cell while he wrote it.

Q. In connection with pleadings filed in Court by a lot of your inmates, you have a lot of pleadings filed by your inmates down there; do you not?

Mr. Smithson: If it please the Court, I will concede counsel's point if it were pertinent would be material. We have no such pleadings in issue in this matter.

Mr. Carey: Goes to show routine, Your Honor. I am going to offer in evidence here a pleading which was filed by Willie Lee Stewart in this case, to show he didn't write it; he wouldn't be able to write it.

By Mr. Carey:

Q. In fact, you have down there what you call jail house lawyers; do you not?

A. Yes, sir.

Q. Some fellow is a little brighter than the other guy, he likes to go down to the library, or what have you, and write these pleadings for them?

A. No. Can't get down to the library. Maximum security [fol. 725] cellblock prisoners don't have access to the library.

Q. He has somebody do it for him.

A. In the cellblock.

Q. Sure.

Mr. Carey: Excuse me, Your Honor.

The Court: You won't need it at this time.

Mr. Carey: I am going to ask him, Your Honor—I am going to show him something to show how this is done.

By Mr. Carey:

Q. There, I show you a pleading, it is identified as Motion to Dismiss Court-Appointed Counsel.

Mr. Smithson: I object to this because this is way afield from the subject of the direct.

Counsel, I might say, is starting those remarks again.

I ask first that it be shown—

The Court: You may do that as part of your case, but not with this witness.

Mr. Carey: All right, I will withdraw it, Your Honor.

By Mr. Carey:

Q. Now, you say you saw this man read the Bible; is that correct?

A. I don't know whether he was reading it or not, sir. Had it open and was looking at it.

Q. Was looking at the Bible; is that correct?

A. Sir?

[fol. 726] Q. He was reading the Bible; is that correct?

A. Indicated such to me.

The Court: He just answered that. He said he was looking at it.

The Witness: I said he had the Bible open in front of him and looking at it.

By Mr. Carey:

Q. When people read the Bible, that is a form of prayer; is it not?

A. Beg pardon, sir?

Q. Reading the Bible is a form of prayer to many people; is it not?

A. I don't know, sir. That is getting on a subject I am not familiar with.

Q. When people read the Bible, who are they praying to?

A. That is hard to say, too. I can't read what is going on in a man's mind.

Q. Now, Lieutenant, in your experience as a citizen, have you not seen or been told that when people read the Bible, they are indulging in a form of prayer?

A. A lot of people read the Bible to gain knowledge.

Q. Answer the question.

A. I don't know.

Q. Have you ever gone to church on Sunday and heard your clergyman read from the Bible?

[fol. 727] A. Yes.

Q. What is he doing? Is he trying to educate himself or is he praying at that particular time?

A. Trying to educate me.

Q. Is that a hard job?

A. Yes; sir.

Mr. Smithson: I object to that. I think this is exceeding the bounds of cross examination.

The Court: Yes. I doubt the inquiry has anything to do with our case. May be very interesting.

Mr. Carey: Well, frankly, the reason I tried to show it, Your Honor, is this: It is my observation—of course, probably the lieutenant is more experienced than I—when people read the Bible, they read it in order, to indulge in prayer; and if they are indulging in prayer, they are praying to somebody up above, and the one up above is the Supreme Deity.

The Court: Why this little talk?

Mr. Carey: Trying to show Willie Lee Stewart was in communication with his Maker when he was reading the Bible. Not unusual for a man to talk to his Lord.

By Mr. Carey:

Q. Lieutenant, I show you here this long exhibit—we get away from the Bible; apparently you want to and the Court won't allow me—will you read that there, please?

[fol. 728] A. Date?

Q. Yes.

A. January 7, 1956.

Want me to read the whole thing?

Q. Yes.

A. "Memo Regarding Inmate Stewart."

The Court: He can't read that. The Jury can't hear that yet. It has to be in evidence before it can be heard.



By Mr. Carey:

Q. Lieutenant, was there any time when you had difficulty with Willie Lee Stewart down at the jail?

Mr. Smithson: Your Honor, I know what counsel is going to get by way of reply. I know what the lieutenant is apt to say. I would caution counsel that he is opening the door to something that I don't think he wants in.

Mr. Carey: We may offer it in rebuttal, Your Honor. I think that is probably the best procedure.

The Court: Yes.

Mr. Smithson: Is that all, counsel?

Mr. Carey: That is all.

Redirect examination.

By Mr. Smithson:

Q. You have been asked, sir, with regard to certain of these exhibits as being pure form and requiring only a signature.

[fol. 729] A. Yes, sir.

Q. I show you, sir, 13-25, for one. Does the body of this particular thing make a request on anyone? Does it make a request of anyone?

Mr. Carey: I am going to object.

By Mr. Smithson:

Q. Or is it filled out completely except for signature?

Mr. Carey: I am going to object to that because I understand the prosecutor is going to offer these in evidence over our objection. That being true, the record speaks for itself and requires no interpretation.

Mr. Smithson: I think, Your Honor, in view of the cross examination, he opened the door in that respect.

The Court: Objection sustained.

Mr. Smithson: All right, Your Honor.

By Mr. Smithson:

Q. Starting with 13-36, sir, is this document—

The Court: Not 36.

Mr. Smithson: 13-16. I am sorry, Your Honor.

By Mr. Smithson:

Q. Is this particular item a form, Lieutenant?

A. No, sir.

Q. What is it?

A. Standard piece of institutional paper.

Q. Does it have any heading on it at all, sir?

[fol. 730] Mr. Carey: **Objection to that, Your Honor, for the same reason. The exhibit speaks for itself.**

The Court: **Sustained.**

Mr. Smithson: All right, Your Honor.

The Court: You will have the privilege of reading them to the Jury and exhibiting them.

Mr. Smithson: Thank you, Your Honor.

In view of the comment of the Court that we may read these to the Jury and exhibit them to them, I guess I could have nothing else with the witness.

The Court: Step out, in that case.

(Witness excused.)

The Court: We will suspend and take a ten-minute recess. The Jury, please keep in mind the admonition.

(Whereupon a short recess was taken.)

[fol. 731] (At 3:17 p.m., after the midafternoon recess, the hearing was resumed as follows:)

Mr. Smithson: May I have the witness, William G. Cushard.

Dr. Cushard.

The Deputy Clerk: If there are any other witnesses in the courtroom, please retire to the witness room.

Mr. Carey: I am through with the witness, Lt. Depro. We want to call him back later and I hope he is not being excused permanently.

The Court: I thought you were through with him.

Mr. Carey: For cross-examination. We may intend to offer him as a rebuttal witness for direct testimony.

Mr. Smithson: If it please the Court, the witness, Lt. Depro, right now is selecting those items which were offered and received in evidence. He is just about completed it, and the file is here. I understand he can return, but I doubt if counsel will get to him today, if counsel so requests.

The Court: Lieutenant, will you do your work at the table over here, please?

Mr. Carey: One further inquiry, Your Honor, if I may. What are you going to do with these exhibits that the Lieutenant has extracted from the file?

Mr. Smithson: I understood from the Court that I am permitted to read these to the jury.

[fol. 732] The Court: They are the exhibits?

Mr. Carey: I am going to suggest they be read now before Dr. Cushard takes the stand, because these exhibits which are offered in evidence may have some effect on the questions we ask Dr. Cushard. I think we should do this in a proper fashion.

The Court: I think the District Attorney may outline his own case.

Whereupon—WILLIAM G. CUSHARD was called as a witness in rebuttal by the Government and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Smithson:

Q. Your name is William G. Cushard?

A. That is correct.

Q. And your profession?

A. I am a physician, M.D., specializing in psychiatry and the treatment of nervous and mental diseases.

Q. Doctor, are you a graduate of a medical college?

A. I graduated from George Washington University Medical School in 1927.

Q. And are you licensed to practice here, sir?

A. I am licensed to practice in Maryland and in West [fol. 733] Virginia.

Q. All right.

Do you have any position, sir, with any mental institution?

A. I have.

Q. Tell me, sir, what is your present position?

A. My present position is Chief of Psychiatric Service, the West Side Service, and this includes Maximum Security Unit at St. Elizabeths Hospital.

Q. Doctor, how long have you been connected—

Mr. Ackerly: We will be glad to stipulate Dr. Cushard is a very well qualified psychiatrist.

Mr. Smithson: I prefer to make his qualifications a matter of record.

By Mr. Smithson:

Q. Doctor, how long have you been connected with St. Elizabeths Hospital?

A. Might I state something that came before I went to St. Elizabeths Hospital?

Q. You will, in the basis of your qualifications, if you will.

A. Following my graduation from George Washington Medical School, I had a general rotating internship at Garfield Memorial Hospital in Washington, and following that was in general practice for a short time, and then went to [fol. 734] St. Elizabeths Hospital in June of 1929.

Q. All right, Doctor, have you been with St. Elizabeths ever since?

A. Continuously since June 1929.

Q. How long have you been chief of this particular service which you say includes the maximum security?

A. I have been chief of this particular service since 1953. I was chief of another psychiatric service there from 1931 on.

Q. All right sir. Tell me, does the section which you have classified as the maximum security, embrace and encompass those who are or have been charged with crime?

A. All of the male patients in the hospital who are in any type of criminal status.

Q. All right sir.

Now, Doctor, have you any—are you a member or a fellow, or a member of any psychiatric association or board or society?

A. I am—my office, of course—I have been in practice, private practice in Montgomery County, Maryland, since 1937, and my private office is there. I belong to the Montgomery County Medical Society, the Montgomery County, Maryland, Medical Society, and the Medical and Chirurgical Society, which is the state medical society of Maryland, and I am certified by the American Board of Psychiatrists and [fol. 735] Neurology as a specialist in psychiatry. That is the—there are a number of specialty boards which are set up by the medical profession in order that those who wish to qualify as specialists in the various branches of medicine may take examinations and be accepted by the profession itself as specialists.

I might say there is an American Board of Surgery and an American Board of Internal Medicine and an American Board of Gynecology, then there is an American Board of Psychiatry and Neurology, which is one of the specialty boards for those who wish to become qualified in that field.

Q. What are the requirements for such a board?

A. Well; the requirements are, to begin with, are one that has had five years' experience in the field of psychiatry, that is specialized experience and training in the field of psychiatry before he can even apply for the examination.

Q. What—

A. And the examination is, usually lasts two days, about 8 hours of oral examination each day, and it's on the basis of that examination that one is qualified or rejected as a specialist.

Q. Now, Doctor, during the course of your experience and your training both at St. Elizabeths and since your training, [fol. 736] have you had occasion, sir, to testify as an expert in the field of psychiatry in this District Court?

A. Yes, sir.

Q. Have you had occasion, sir, to testify in any other courts?

A. Yes, sir.

Q. Could you estimate how many times, Doctor?

A. That is pretty difficult. Quite a few hundred times.

Q. All right, Doctor.

A. Here and in the State of Maryland.

Q. All right.

Now, Doctor, during the course of your employment as the

chief of your service at St. Elizabeths Hospital, did you have occasion to perform an examination of one Willie Lee Stewart?

Mr. Ackerly: Objection.

May we approach the bench?

The Court: Yes.

(At the bench:)

Mr. Ackerly: I believe Dr. Cushman will testify that the first time that he saw Willie Lee Stewart was in December of 1957. I believe he will also be willing to testify that he has no opinion whatsoever as to his soundness or unsoundness of mind or as to the existence of a mental disease or mental [fol. 737] defect in March of 1953.

Now, it is going to be highly prejudicial for this jury if I have to object to each question, but I believe that would be the substance of his testimony, and if so I think his Honor should rule on it right now.

It is not an issue.

The Court: Well, I can't rule on your understanding of it.

Mr. Ackerly: I think Mr. Smithson would be candid enough, I hope he is, enough, with us, to so state what the purport of the doctor's testimony is to prevent undue prejudice to this jury.

Mr. Smithson: This witness will not be offered to make any statement as to what his examination between December of '57 and May of '58 or April of '58 had regarding the man's condition in March of 1953. He will be offered to rebut the testimony of Dr. E. Y. Williams, who said he had examined him on several occasions since the period of June of 1953 up to the present date and has always found him to be a manic-depressive psychosis or schizo-affective psychosis.

It is a matter of record for the defendant, the testimony of Dr. E. Y. Williams before this jury.

Further than that, he will be offered, Your Honor, to show that the defendant was a malingerer, and is malingering at the present time, because we will also offer the testimony [fol. 738] of the doctor to that.

We will offer and show to the doctor, or make a summary or assumption based on the testimony of the witness Earl Jones, and of the witness Lt. Depro, and of the documents,



and we will offer it to show that the defendant was malingering and is malingering when he took the stand and displayed before the jury for the purpose of attempting, seeking to get a not guilty by reason of insanity verdict at this trial, is, during this trial.

Mr. Ackerly: Your Honor, when you charge the jury, the only issue that you will give that jury on sanity will be as of March 12, 1953. His mental condition as of today is totally irrelevant to the issues in the proceeding. Your Honor has already ruled that the man shall stand trial and you ruled that he was malingering, but that is not an issue for the jury. Your Honor made that determination in advance of the trial. This is not proper rebuttal. Dr. Williams did not testify to what the prosecutor represents, and furthermore, the defendant was put on the stand as any defendant is put on the stand. It has no relation to the issue in this case, which is March 12, 1953. I submit it is entirely irrelevant, Your Honor.

The Court: Objection overruled.

I will ask Mr. Smithson to stay close within the confines of the purpose which you have announced.

[fol. 739] Mr. Smithson: I will do my best and if at any time counsel or the Court think I am approaching any line, if they will just object I will come to the bench.

Mr. Ackerly: I would like the opportunity to register my objection to the entire line of testimony, so I am not in the position of having to object.

The Court: You haven't had it yet.

Mr. Ackerly: Your Honor, I object on the basis of his proffer. I will object to each question, if Your Honor prefers.

The Court: You will have to do it. That is the only way to do it.

Mr. Ackerly: Very well.

The Court: Except for your objection made now; you will have adverse ruling on that. If that is what you have in mind, you already have it.

Mr. Ackerly: Well, I will just have to register my objection to each question. I think it puts me in the position of creating prejudice.

The Court: Proceed.

(In open court:)

By Mr. Smithson:

Q. Doctor, during the course of your employment with St. Elizabeths in the position or staff capacity you have related, did you have occasion to examine the defendant, [fol. 740] Willie Lee Stewart?

A. I did.

Q. Would you relate, sir, the date?

A. During his period of hospitalization there, that is from December 16, 1957, until April 16, 1958.

Q. All right, sir. Tell me, sir, did you likewise have occasion to consult with other physicians and members of the staff and aid-s there regarding the defendant?

A. I did.

Q. Now, sir, can you relate to us approximately how many times you saw the defendant?

Mr. Ackerly: Objection, Your Honor, if it is during the period December 1957 to April '58.

The Court: Objection overruled.

By Mr. Smithson:

Q. Specifically, during that period, sir, how many times did you have occasion to see him or to observe him?

A. I can't actually say, Mr. Smithson, how many times I did. As you make the rounds you see many patients. You examine them sometimes. Other times you just speak to them briefly.

I know of three definite examinations of some length that I conducted, however, in addition to many other contacts of lesser extent.

Q. What were the dates of those, if you recall?

[fol. 741] The Court: Will you hold your answer? I have to return to my chambers for a few moments. Just be at ease, please.

The jury should remain in the box.

(Short recess.)

The Court: Mr. Smithson, you may proceed.

By Mr. Smithson:

Q. Doctor, can you state for us what days it was that you performed these three examinations you mentioned?

A. On January 2nd, 1957 I examined the patient at some length and—

Mr. Ackerly: Sorry, Doctor, I didn't get the year.

The Witness: January 1, 1957. I had a rather lengthy, formal—I beg your pardon, that is a misprint.

That should be January 2, 1958.

Mr. Ackerly: Thank you.

The Witness: Because he was admitted in December, 1957.

Mr. Ackerly: Thank you.

The Witness: At that time I attempted to go over the patient's case with him, in as much detail as possible, but was actually able to get very little relevant information because every answer would be "I don't know," or some completely irrelevant thing, even having less relationship to the question than that. He appeared in a diagnostic staff [fok 742] conference on February 3, 1958, at which I was present.

Mr. Ackerly: Your Honor, the doctor apparently is going to testify to each one of these examinations steadily. The question was just what dates. So I object, because the answer is not responsive.

The Court: Objection overruled.

Mr. Ackerly: And I have my other objection too.

By Mr. Smithson:

Would you proceed with the dates and relate your examination?

A. The second date, February 3, 1958, at which I was present, this was a lengthy conference interview, and the third, which was the second conference interview, and also a lengthy one, was on April 14, 1958, just two days before he was discharged from St. Elizabeths Hospital.

Q. All right, now, during the course of that,—incidentally, Doctor, do you know an Earl E. Jones?

A. I do.

Q. What is his capacity in your organization?

Mr. Ackerly: Objection. It is irrelevant.

The Court: Objection overruled.

You may answer.

The Witness: Mr. Jones is a psychiatric aide at St. Elizabeths Hospital, who works in the maximum security building.

By Mr. Smithson:

[fol. 743] Q. And what is meant by a psychiatric aide?

Mr. Ackerly: Objection, Your Honor, we have been over this already:

The Court: Objection overruled.

The Witness: Well, when a ward employee first takes employment at the hospital, he is hired as a probationary attendant. He then undergoes a period of training, lectures and ward instruction, and if he qualifies he is then accepted as a psychiatric attendant for ward duty.

Now, after he has had a certain amount of experience, I am not sure of the exact length of time because that is handled by the nursing service, he then may take a more advanced course of instruction and if he completes this, and the final examinations, of course, are satisfactory, he receives a certificate as a psychiatric aide, which is similar to a nurse, although I want to emphasize that he is an R.N. He is not a registered nurse, but he has had that special training in psychiatric nursing. He is then qualified to do all ordinary nursing procedures, to give medication, hypodermics, and various treatments which are ordered by physicians.

By Mr. Smithson:

Q. Doctor, have you had occasion, during the course of that period from December to, I believe the completion date was April, was that it, in 1958?

[fol. 744] A. December 16, 1957 to April 16, 1958.

Q. Did you have occasion, sir, to receive any information from Earl E. Jones, relative to the conduct and general information of the defendant Willie Lee Stewart?

Mr. Ackerly: Objection, Your Honor. That is highly leading and completely hearsay.

The Court: Objection overruled.

The Witness: I did.

By Mr. Smithson:

Q. Now, sir, did you receive any information from him relative to his—any discussion that Mr. Jones had with the defendant regarding his family?

Mr. Ackerly: Objection, Your Honor. That again is leading and hearsay. Jones testified here today, Your Honor.

The Court: Objection overruled.

The Witness: My conversation with Mr. Jones—

Mr. Ackerly: I object. The question was, did you have a conversation.

The Witness: Conversations, but not about the patient's statements about his family, about his work and behavior.

The Court: The answer is "No."

Next question.

By Mr. Smithson:

Q. Now, with regard to his ward behavior, did you re-  
[fol. 745]. ceive any such information from Jones?

A. Yes, sir.

Mr. Carey: Objection.

By Mr. Smithson:

Q. Now, sir, what was the information that you received from Jones, as this ward attendant?

Mr. Ackerly: Objection, Your Honor.

The Court: Sustained.

By Mr. Smithson:

Q. All right sir.

Assume, sir, that the defendant—strike that.

Assume, sir, that the witness Earl E. Jones, stated—

Mr. Ackerly: Objection to the form of this question.

The Court: I haven't heard the question.

Mr. Ackerly: But he is going—

The Court: I have to hear the question and you may object.

Mr. Ackerly: Could we state it at the bench?

The Court: No, I will hear it after the question.

Proceed.

By Mr. Smithson:

Q. Assume, sir, that the witness Earl E. Jones, stated that during the period of December of '57 through April [fol. 746] of 1958, with one exception, when the defendant wasn't there with him, that he discussed with the defendant his family and the defendant informed him that he had children, 8 children, in fact, that he requested of the witness, Earl E. Jones, pictures of his family, that the defendant, that the witness stated the defendant socialized—well, got along with the patients, was cooperative, played cards, checkers, and talked freely with the patients, that the defendant showed Earl E. Jones that he couldn't read, but that Earl E. Jones did see him looking at books.

Now, sir, assuming that, would that assist you, sir, in any way in arriving at a conclusion as to what the defendant's condition was between the period December of '57 and April of '58?

Mr. Ackerly: Objection. In the first place, the question is not accurate. It is not complete.

The Court: Objection sustained.

By Mr. Smithson:

Q. Tell me, sir, during your examination of the defendant, did you find any manic-depressive psychosis in him?

A. No, sir, no evidence of it.

Mr. Ackerly: Objection, Your Honor.

The Court: Objection overruled.

Mr. Smithson: Thank you, Your Honor.

By Mr. Smithson:

[fol. 747] Q. Tell me, sir, is that a mental disease?

A. Manic-depressive psychosis?

Q. Yes. Manic-depressive psychosis.

A. Yes, that is a mental disease.

Q. Tell me, sir, is schizo-affective psychosis a mental disease?

A. It is a type of schizophrenia, yes, sir.

Q. Is it the same as manic-depressive psychosis?

A. No, sir.

Q. Did you find present in the defendant, sir, a schizo-affective psychosis during that period?



Mr. Ackerly: Objection. May we have the date, did he find as of which, Your Honor?

Mr. Smithson: I said during the period, Your Honor, of December of '57 to April of '58.

Mr. Carey: You didn't say that.

Mr. Ackerly: I didn't hear that.

Mr. Smithson: The examination is limited strictly to that. That is what the witness has just testified.

The Witness: I beg your pardon. Did I find evidence of what?

By Mr. Smithson:

Q. A Schizo-affective psychosis during the period that you observed him.

A. Oh, no.

[fol. 748] Q. Tell me, sir, what is a malingerer?

Mr. Ackerly: Objection, Your Honor.

The Court: Objection overruled.

By Mr. Smithson:

Q. What is a malingerer?

A. A malingerer is a person who attempts to simulate mental disease which is not actually present.

Q. Tell me, sir, with regard to the defendant, Willie Lee Stewart, did you arrive at any conclusion as to whether or not, during the period December '57 to April '58, he was a malingerer?

Mr. Ackerly: Objection.

The Court: Objection overruled.

The Witness: It was my opinion that he was malingering because I found no evidence of mental illness.

Mr. Smithson: All right, sir.

Mr. Ackerly: I didn't hear. You dropped your voice.

The Witness: It was my belief and conclusion that he was malingering because I was unable to find any evidence of mental disease.

Mr. Ackerly: Yes, sir.

By Mr. Smithson:

Q. All right, sir. Now, assume, sir, that a mental defect is a condition of the mind which is not capable of either

improving or deteriorating, or which may be either congenital, that is existing at birth, or the result of injury, or the residual effect of a physical or mental disease, sir, during the period of time that he was under your observation, sir, did you arrive at any conclusion as to whether or not the defendant had a mental defect?

Mr. Ackerly: Objection, Your Honor. The question is incomplete.

The Court: Objection overruled.

Answer.

The Witness: From the medical standpoint, and as a result of my examinations, I don't feel that this individual is mentally defective. I think that he is dull, and that his intelligence lies in the either low dull, normal, or so-called borderline area of intelligence. But I don't think he has any severe degree of mental deficiency.

Q. All right, sir.

A. He is below average in intelligence.

Q. All right, sir.

Mr. Smithson: Your witness.

Mr. Carey: Excuse us a moment, Your Honor, please.

Mr. Smithson: Your Honor, before counsel, if I might, I would like to ask something or put something else to the witness, if I may.

The Court: Very well.

[fol. 750] Mr. Smithson: I notice the lieutenant is finished. May I use these documents?

The Court: Yes.

By Mr. Smithson:

Q. Doctor, I want to put certain questions to you and show you certain exhibits, and put a question to you. Don't answer it until the defense has time to object.

I show you, sir, Government Exhibit 13-1, with regard, sir, to a signature which appears thereon.

I show you, sir, 13-2, with regard to a signature that appears at the bottom.

13-3, with regard to a signature which appears on the side.

13-4, with regard to a signature at the side, sir.

13-5, with regard to a signature on the side.

13-6, with regard to such a signature.

13-7, with regard to that signature on the left side, sir.

13-8, with regard to the signature which appears on the side here, sir.

13-10, sir, with regard to a signature which appears on this form along with other writing.

13-11, sir, with regard to a form which includes not only the writing and signature but the material contained within the message on 13-11, sir.

[fol. 751] I show you, sir, Government Exhibit 13-12, with regard to a signature.

13-13, with regard to the signature.

13-14, with regard to the signature alone, sir.

13-15, with regard to the signature on the left.

13-16, sir, in its entirety, consisting of a single page of lined paper, the message and signature.

Would you read it to yourself, sir.

13-20, sir, with regard to the message alone, which is filled in there. Would you peruse the message, sir, or read the message.

13-22, to the message alone, sir, would you peruse the message.

13-23, to the message alone, sir, contained therein.

13-24, to the message which is contained therein, sir.

13-25, to the message contained therein, by "therein" I mean in the pencil, sir.

13-26, sir, with regard to the message alone contained therein in pencil.

13-27, with regard to the message contained within, sir.

13-28, with regard to the message on this page, sir, contained in the pencil.

[fol. 752] 13-29, sir, with regard to the message contained within this memo.

13-30, sir, with regard to the entire matter contained on that single blank line page and the signature.

Tell me, sir, having perused the exhibits which have been received in evidence as the writings of the defendant, Willie Lee Stewart, sir, do those documents confirm or reject your concept that the defendant was malingering during the period you saw him?

Mr. Ackerly: Objection, Your Honor.

The Court: Objection sustained.

Mr. Smithson: Your witness.

## Cross-examination.

By Mr. Ackerly:

Q. Doctor, you have a number of people in St. Elizabeths who can write their own names, don't you?

A. Quite a few, yes.

Q. And you have quite a few at St. Elizabeths who can write letters?

A. Many of them, yes. Most of them.

Q. Many of them write very well.

A. Well, of course, a good deal of variation in how well they write, but most of them do write letters.

Q. You have had patients out there who have written poetry that has been published, haven't you, Doctor?

[fol. 753] A. Definitely.

Q. Doctor, did you, you are familiar with a man by the name of David Wechsler, are you not?

A. Yes.

Q. Chief Psychologist, Bellevue Psychiatric Hospital.

A. Yes.

Q. Adjunct Professor of Psychology, Graduate School of Arts and Sciences, New York University?

A. Yes, I am familiar with Dr. Wechsler.

Q. Clinical Professor of Clinical Psychology, New York University College of Medicine.

A. I would like to limit my answer to saying that I am not familiar with all of his titles, but I am familiar with his qualifications as an outstanding clinical psychologist.

Q. An outstanding clinical psychologist?

A. Yes.

Q. Are you familiar with the work called "The Measurement and Appraisal of Adult Intelligence"?

A. Not particularly, no.

Q. He is the originator of the Wechsler Bellevue intelligence scale, is he not?

A. Yes, he was certainly one of the important people.

Q. It was named after him.

[fol. 754] A. Yes.

Q. And, Doctor, would you agree with Mr. Wechsler when he classifies people with an IQ of 69 and below as defective?

A. Well, I will have to say that he is speaking entirely there as a clinical psychologist, and I would presume—

Q. I appreciate that.

A. And I don't think that mental deficiency is determined solely and entirely on the basis of an intelligence quotient. It is important, but it is not the whole story.

Q. Now, Doctor, would you answer my question.

Mr. Smithson: I believe the witness has answered his question, Your Honor.

Mr. Ackerly: I think the doctor knows.

The Court: Next question, please.

Mr. Ackerly: All right, Your Honor, I will have to repeat this until I get an answer.

By Mr. Ackerly:

Q. Would you agree with Mr. Wechsler's statistical results that a person with an IQ of 69 and below is defective?

A. As a psychiatrist I cannot base an opinion as to mental deficiency entirely on clinical psychological examinations, therefore I cannot answer the question.

[fol. 755] Q. Yes, sir. Would you agree with him, sir, from his studies, that people with an IQ of 69 and below comprise 2.2 percent of the population of the United States between the ages of 16 and 75?

A. Frankly, I don't know. I am not a clinical psychologist.

Q. Would you accept Mr. Weschsler's published—January 1958 published data on that, Doctor?

A. I would accept what he says as being the writing of a well-known clinical psychologist, yes, sir.

Q. And you would question the accuracy of it, would you?

A. I will have to answer that question the same way as I did before, that I don't base opinions as to mental deficiencies purely upon clinical psychological examinations.

Q. And if he classifies 90 to 109 as average intelligence, would you agree with that, Doctor?

A. I don't think that I am qualified to either agree or disagree with the qualified clinical psychologist, because I am not a qualified clinical psychologist.

Q. Thank you, Doctor.

Mr. Ackerly: No further questions.

### Redirect examination.

By Mr. Smithson:

Q. Doctor, do you believe that a qualified psychologist [fol. 756] can make a determination of mental disease?

A. I do not think that is the function of a clinical psychologist; I think that is a medical matter, and the clinical psychological results are taken into consideration, by the psychiatrist in making such determinations but they are not necessarily conclusive.

Q. And Wechsler is a psychologist, not a psychiatrist.

A. A clinical psychologist, yes.

### Recross examination.

By Mr. Ackerly:

Q. Can you determine, Doctor—let me put it this way: Would a person with an IQ of 10, as reported to you by a psychologist, with no further examination, be considered by you as a person who is mentally defective and suffering from a mental defect?

Mr. Smithson: I don't believe this is proper recross, Your Honor.

The Court: Sustained.

Mr. Ackerly: Your Honor, it is right on the question he just asked.

The Court: Objection sustained.

Mr. Ackerly: I don't know any other way to ask it, Your Honor.

May I have just a moment?

[fol. 757] By Mr. Ackerly:

Q. Doctor, you do have psychologists at St. Elizabeths Hospital, don't you?

A. Yes, sir.

Q. And do you not, quite often, have patients referred to the psychologists for a psychological evaluation?

A. In all cases where there are criminal charges involved we get them in nearly all cases, not invariably, but the clinical psychological examinations are important in connection with the total evaluation. The importance may vary



in different cases, but we get them in the large majority of these cases.

Q. And particularly with reference to the existence or absence of a mental defect?

A. They are used in connection with that, but even more often in connection with the determination of what personality traits may be brought out by the so-called projective clinical psychological tests because the percentage of mental defectives that we get in that department is rather low, but even though we may have no doubt about the patient being of average intelligence or better, we like to have clinical psychological examinations because they give us many important clues and sometimes confirmation as to our psychiatric findings regarding the personality of the person [fol. 758] examined.

Q. At St. Elizabeths, Doctor, you conduct a number of examinations of new patients, do you not?

A. Yes, sir.

Q. Are you usually able to complete all of the normal examinations of a new patient and form a complete conclusion on the majority of your patients in 30 to 40 minutes?

A. Complete conclusion in 30 or 40 minutes?

Q. Yes, sir.

A. No, sir.

Mr. Ackerly: No further questions, Your Honor.

Redirect examination.

By Mr. Smithson:

Q. Tell me, Doctor, can you determine the presence in 30 to 45 minutes of a frank mental disease or disorder or psychosis?

A. It would depend on the individual case. I think it is absolutely impossible to generalize about that. There are some cases where one could, yes. Other cases, I think, where one couldn't. I think the length of the examination is a matter which has to be determined by the person being examined, and the skill of the examiner.

Q. Tell me, Doctor, speaking of that, do you know Dr. Klein, Elmer Klein?

A. Dr. Elmer Klein?

[fol. 759] Q. Yes.

A. Yes.

Q. How about Dr. Morris Kleinerman?

A. Yes.

Q. Tell me, sir, do you know whether or not they are qualified psychiatrists?

Mr. Ackerly: Objection, Your Honor.

Mr. Smithson: He opened the door for this.

Mr. Ackerly: No, sir, the doctors have testified. They are experts.

The Court: Objection overruled.

You may answer, Doctor.

The Witness: Well, of course, I prefer not to speak about the qualifications of other doctors. I might say in this case I do know that so far as—

The Court: Withdraw the question, please.

Mr. Smithson: All right, Your Honor.

By Mr. Smithson:

Q. Do you or do you not know them as psychiatrists?

A. Quite well, yes.

Recross-examination.

By Mr. Ackerly:

Q. You also know Dr. E. Y. Williams as a psychiatrist?

A. Yes. I don't know him as well. I have known Dr. Klein for about 25 years and Dr. Kleinerman for almost the [fol. 760-761] same length of time, but I have only met Dr. Williams a few times.

Q. Dr. Williams was Chief of Neuropsychiatric Service at Freedmans Hospital, is that not correct?

A. I believe that is correct.

Mr. Smithson: Nothing further.

Mr. Ackerly: No further questions.

The Witness: May I be excused?

The Court: Yes, you may be excused.

[fol.762]

## PROCEEDINGS

The Court: Mr. Smithson, will you proceed, please.

Mr. Smithson: Yes, Your Honor. I was waiting for the defendant to come out, Your Honor.

The Court: Oh, yes.

(The defendant was brought into the courtroom.)

Mr. Smithson: Doctor McIndoo.

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DR. MARY V. MCINDOO, SWORN.

Mr. Carey: Your Honor, at this time we would like to approach the bench, if we may.

The Court: Yes.

(At the bench:)

Mr. Carey: We should like to solicit a proffer of proof from the prosecutor as to what the testimony will develop from this doctor, that we may raise what we consider will be proper objections.

Mr. Smithson: I think we will follow much the same procedure we did yesterday with Doctor Cushard. In other words, it will be in opposition to the testimony of Doctor Williams, that he had examined this man for some length of time, and also to counteract and offer the testimony of this witness, particularly to date of October 28, just prior to this trial, which would be contrary to the actions of the defendant in that she would specifically say he was malingering.

Mr. Carey: We will object to that because malingering [fol. 763] isn't an issue in this case. The test in this case is whether he was sane or insane at the time the crime was committed, not his present situation.

The Court: Objection overruled.

Mr. Carey: Another objection we would have: I don't think we ever agreed to allow this woman to examine the defendant in the latter part of October 1958.

Mr. Smithson: She examined him by Court order, sir.

Mr. Carey: Were we ever furnished a copy of that Court order?

Mr. Smithson: I can't say positive. It is my distinct impression you were.

Mr. Carey: The record will reflect we never were handed a copy of that or apprised of the fact.

Mr. Smithson: I think you were. I think you were notified that I would ask the Court to have him examined, if I might have him examined. In fact, I think his Honor signed his order with that understanding.

Mr. Carey: Who did you talk to?

Mr. Smithson: I think it was both of you but I can't honestly say.

Mr. Carey: I won't take a firm position. He may have spoken to me but I don't remember.

[fol. 764]. If you say you did, I am willing to accept it.

Mr. Smithson: Counsel, if you will recall. I have a distinct recollection and the order is in there, Counsel. If I am not mistaken, I think the copy of the order was given to Mr. Ackerly.

Mr. Ackerly: I have never seen that order before, Your Honor. I saw it in the file this morning. In fact, it starts off "Upon consideration of motion of defense counsel." We made no motion.

Mr. Smithson: Your original motion is what is referred to, Counsel.

Mr. Ackerly: I have never seen this. It is not endorsed. I assure Your Honor I have never seen that order before.

Mr. Smithson: I have a distinct recollection—

The Court: Mr. Carey says if you give assurance that it was done that he raises no point.

Mr. Smithson: Your Honor, I not only will give assurance—I can't say to which counsel I spoke, I must be candid in that—but I will say to Court and Counsel present and for the record I spoke to one of the counsel before I presented that order to Your Honor.

Mr. Carey: It may be we have forgotten about it. As I say, I make no issue about it.

[fol. 765] Mr. Smithson: I appreciate that, but I do want to be candid with the Court because I did represent to the Court I had spoken to counsel, if the Court will recall.

The Court: Very well.

(Counsel returned to trial tables.)

## Direct examination.

Mr. Smithson:

Q. Your name is Mary V. McIndoo, is that correct?

A. It is correct.

Q. Your occupation?

A. I am a psychiatrist.

Q. Are you a doctor of medicine?

A. I am.

Q. Graduate of what school?

A. Woman's Medical School, Pennsylvania.

Q. What year?

A. 1950.

Q. Since then what have you specialized in?

A. Psychiatry.

Q. Would you give us your training in that specialty.

A. I served two years in the Navy as a psychiatrist. I have had—

Mr. Carey: We will stipulate as to the distinguished lady's qualifications.

Mr. Smithson: I think, for the purpose of the Jury—I appreciate the offer—I think the jury should have it for the [fcl. 766] evaluation of the witness's testimony.

The Court: You may proceed.

A. I completed my residency training at Friends Hospital in Philadelphia, a large private mental hospital. I am on the staff of Georgetown University Medical School as a teacher in psychiatry. I have been on the staff of D. C. General Hospital over two years as assistant chief psychiatrist. I am certified by the American Board of Psychiatry and Neurology.

Q. And during the course of your time in the District of Columbia, have you had occasion to qualify as an expert in the field of psychiatry and testify to that effect?

A. I have.

Q. Tell me, Doctor, have you had occasion during the period of July and August of 1958 and again on October 28 of 1958 to examine one Willie Lee Stewart?

A. I have.

Q. Is that person here that you examined?

A. He is.

Q. How is he dressed at the moment?

Mr. Carey: We will stipulate the defendant is in court and the doctor examined the defendant that is being tried here..

Mr. Smithson: Thank you.

The Court: The record will so show.

By Mr. Smithson:

Q. I have here, Doctor, a matter which you gave me and [fol. 767] I return it to you. What is that particular item?

A. This is the hospital record of Willie Lee Stewart.

Q. Now, Doctor, on what days was it that you examined the defendant, if you recall?

Mr. Carey: Let the record reflect that the distinguished lady is now perusing notes in front of her.

Mr. Smithson: No objection. Conceded, Your Honor.

A. I examined him while he was hospitalized on the 8th of August 1958; and in the jail the 28th of October 1958.

Q. Now, Doctor, at that time, Doctor, did you find at any of those examinations, did you find present in the defendant a manic depressive psychosis?

A. I did not.

Q. Is that a major mental disease, Doctor?

A. It is.

Q. Tell me, Doctor, did you find present in the defendant a schizo-affective psychosis?

A. I did not.

Q. Is that a major mental disease?

A. It is.

Q. Are they the same?

A. No; they are not.

Q. Doctor, as a result of your examination did you arrive at any conclusion as to whether or not the defendant [fol. 768] is a malingerer?

A. I did.

Q. What is that conclusion?

A. That he was malingering at the time of my examination.

Q. Does that likewise include the date of October 28 of 1958?

A. It did.



Mr. Smithson: Your witness.

Mr. Carey: Your Honor, I think again I would like to renew my objection to the doctor's testimony which I made at the bench.

The Court: Yes. The objection overruled.

Cross-examination.

By Mr. Carey:

Q. Doctor McIndoo, you examined the defendant Stewart on October 8, is that correct?

A. October 28.

Q. Just once?

A. In October. August 8.

Q. I am sorry. I misunderstood you. You probably dropped your voice or I wasn't very alert at the time. August 8?

A. That is correct.

Q. August 8 and October 28?

A. That is correct.

[fol. 769] Q. How much time was consumed by you on August 8 in examining the defendant Stewart?

A. Approximately thirty minutes.

Q. About thirty minutes?

A. That is right.

Q. One way or the other. How much time was consumed by you on the second examination, October 28?

A. Forty-five minutes.

Q. Thirty minutes and forty-five minutes. Now, you never examined this man around March or April or May of 1953 when he committed the crime, did you?

A. I did not.

Q. You know nothing about his mental condition at the time he allegedly was involved in a first-degree murder with which he is charged here today, is that correct?

A. That is correct.

Q. Are you familiar with the intelligence quotient of this defendant?

A. I have heard it stated.

Q. What have you heard it stated?

Mr. Smithson: I don't believe, Your Honor, this is the subject of the direct examination.

Mr. Carey: This is cross-examination, may it please the Court.

[fol. 770] Mr. Smithson: May it please the Court, this is not the subject of the direct examination. It is limited strictly to the concept of malingering and I must object.

The Court: Isn't that true?

Mr. Carey: Your Honor, but I want to establish this: I think I will be able to show a prior inconsistent statement by the distinguished doctor; if I am able to establish what his intelligence quotient is and that she knew what it was and whether that was taken into consideration at the time she made this professional conclusion in October of 1958.

The Court: Objection sustained.

By Mr. Carey:

Q. Doctor, in examining a patient, you take into consideration his intelligence quotient?

A. I do.

Q. Did you take into consideration this defendant's intelligence quotient when you professionally concluded that this man is malingering?

A. At the time of my examination I did not know the specific I.Q. determination.

Q. Well, then, would that factor persuade you to change your professional opinion, if you knew what his intelligence quotient was?

A. Not in this particular case, no.

[fol. 771] Q. Why do you say that?

A. Because his intelligence is not so deficient that it would alter the findings, as I found them.

Q. What do you mean, his intelligence quotient is not so mentally deficient it would have any affect in your professional opinion?

A. Because it is in the range where an individual is still capable of being competent and knowing right from wrong.

Q. What category is he put in because of his intelligence quotient?

Mr. Smithson: Again, Your Honor, this is going beyond. I did not object to several of the foregoing questions but

since we are not going into characterization as a psychologist might establish it, I must object.

Mr. Carey: Your Honor, I might say that now we have established that the doctor in drawing her professional conclusion has taken into consideration this man's intelligence quotient, I think I should be allowed to go into it.

The Court: I will take the answer.

Mr. Smithson: All right, Your Honor.

The Witness: I am sorry, what was the question?

(The last question was read by the reporter.)

A. In the high moron level.

Q. And what specifically is his intelligence quotient?

[fol. 772] A. It was stated as 65 and 69.

Q. Is a man with an intelligence quotient of 65 a mental defective?

Mr. Smithson: Objection, Your Honor. We haven't gone into that question. The other witnesses were offered for that purpose. We offered this witness solely as to the issue of malingering. I do object.

The Court: Sustained.

Mr. Carey: Your Honor, can we approach the bench a moment, please?

The Court: Yes.

(At the bench:)

Mr. Carey: Your Honor, I offer this for two reasons. I intend to show by this witness at a previous murder trial, at which time I represented the defendant, this woman categorically stated under oath that one who was a moron is a mental defective and there is a casual relationship between such mental deficiency and the crime committed.

Now, I further suggest that at the time of the motion that we made to determine whether this man was mentally competent to stand trial and effectively assist counsel in the preparation of his defense, this woman was allowed to go into his intelligence quotient and she was asked about the intelligence quotient of less than 70 and she said a person with an intelligence quotient of less than 70 is a mental defective. [fol. 773] Under the purposes of the Durham rule, I think we should be entitled to go into that. I don't think we should be restricted, particularly because this is a first-degree

murder case, and I think we should have a wide gamut of cross-examination.

Mr. Smithson: May it please the Court, certainly counsel has had the widest gamut possibly with all the witnesses, Klein and Kleinerman, in that regard. What this witness may have testified about another defendant in another case would have no bearing on this. Your Honor stopped me in that regard when I wanted to take the testimony of Dr. E. Y. Williams to the effect he had never testified a man was of sound mind in a criminal offense. We went into a much wider scope and the Government offered it at a previous hearing on October 28 and 29 but the objection was made to this witness testifying at all. I, therefore, proffered this witness for one purpose, that is the issue of malingering, to overcome the effect of the testimony before this jury of this defendant; and also to counteract the testimony of Doctor Williams that he had seen this man for such a long period of time. And with that limitation I think counsel likewise on cross-examination should be limited.

Mr. Carey: Your Honor, she also said in drawing her professional conclusion as to the mental competency of this person she took into consideration his intelligence quotient. [fol. 774] That being true, inasmuch as there are a lot of factors which entered into her professional conclusion, I think we should also be able to determine what the other factors were, specifically intelligence quotient, because it is a part of the whole.

Mr. Smithson: Professional conclusion was based on disease, psychosis, manic depressive, also as to malingering, and I.Q. had nothing to do with her determination. Counsel opened the door. I had objected the first time; the Court had sustained me. You went ahead several times, because I don't like to always be standing up and objecting, but then when I did stop you and I think His Honor has sustained my objection, I think it is a valid ruling.

The Court: The objection is sustained.

(Counsel returned to trial tables.)

Mr. Carey: Excuse me a moment, will you, Your Honor, please?

The Court: Certainly.

Mr. Carey: Your Honor, I am going to ask this question. I will ask the doctor not to answer, because I don't want to

impeach upon the Court's ruling. It is a very close ruling: I want to be extremely careful.

The Court: You put your question, and just withhold the answer for a moment.

By Mr. Carey:

Q. Would one's judgement be affected if one had an intelligence quotient less than 70?

Mr. Smithson: Of course, Your Honor, we go to the very issue, Doctors Klein and Kleinerman were offered for that for the Government. This witness was offered solely for the issue of malingering and nothing else, and under the restriction imposed on me I have to object.

Mr. Carey: No restriction has been placed on you. It is being placed on me. Please, I am the one carrying the ball here, I think.

Mr. Smithson: May I have the ruling of the Court on that?

The Court: Objection sustained.

By Mr. Carey:

Q. Doctor, would one with an intelligence quotient of less than 70 but with no psychosis be a mental defective within the ruling of the Durham decision as laid down by the Court of Appeals in this District?

Mr. Smithson: Again, Your Honor, we didn't go into it. And anything below 70 would include an idiot down to 10. I object. It is not proper examination.

The Court: Objection sustained.

By Mr. Carey:

Q. Doctor, do you know me? Have you ever seen me before?

A. Yes; I have.

Q. You and I had the pleasure several years ago of meeting, is that correct?

[fol. 776] A. That is correct.

Q. Do you recall me in the courtroom on a first-degree murder case?

A. I do.

Q. Do you recall the name of the defendant?

Mr. Smithson: I object, Your Honor. We went into this at the bench. Your Honor stopped me on the same thing.

The Court: Sustained.

By Mr. Carey:

Q. Do you recall testifying in a case of the United States versus Lonnie Crittenden?

A. I do.

Mr. Smithson: Object, Your Honor. It is the same type of question.

The Court: Objection sustained.

By Mr. Carey:

Q. Do you recall at that time testifying that one who had an intelligence quotient of less than 70 being a mental defective within the meaning of Durham rule and consequently not responsible for one's crimes?

Mr. Smithson: Your Honor, the question is before the jury. We have made several objections. I think the witness will have to answer it now. Otherwise, the impression is prejudicial.

The Court: Very well. Answer the question.

A. I did in that case, yes.

[fol. 777] Mr. Smithson: Now, I ask, Your Honor, in view of that—I am sorry, I beg your pardon, Counsel. Go ahead.

Mr. Carey: No further questions.

Redirect examination.

By Mr. Smithson:

Q. Was there an examination and report in that case limited to that case. Doctor?

A. It was.

Mr. Smithson: That is all.

The Court: Thank you, Doctor.

(The witness stepped down.)

Mr. Smithson: Would Your Honor indulge me for a moment? I would like to speak to a witness.



The Marshal: Your Honor, Doctor McIndoo wants to know may she be excused for good.

Mr. Carey: Doctor McIndoo may go.

The Court: Mr. Smithson, shall we excuse Doctor McIndoo?

Mr. Smithson: I am sure she would appreciate it and I see no reason not to.

The Court: Very well. You are at liberty to go.

Mr. Smithson: May we approach, Your Honor?

(At the bench:)

#### COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Smithson: Your Honor, I don't mean to delay this. I wanted to acquaint the Court with what my problem was. I have an abstract of this man's classification interview at [fol. 778] the jail, wherein he admitted that he was literate, not illiterate; four grades of school attended; specified his wife to the classification officer; spoke of his employment and his general background. In view of the nature of the testimony of Doctor Williams and the replies of the witness Willie Lee Stewart to examination by counsel and cross-examination, to be candid, I was going to proffer that and I have made an attempt to try and locate the actual classification officer who took it. He is not available. It is a part of the files. Lieutenant Depro is here. The report is being forwarded.

I would suggest this to the Court as a proffer for the Court's ruling: that we would put on Lieutenant Depro to state as to the practice, I should say, the institutional work in taking such classification statements; that this was such a classification statement and it was normal under the Federal Shop-Book rule to keep such in Federal institutions; and offer that part of the classification statement which had to do with his employment, had to do with his knowledge and recollection of the family, and such matters as that. I would be more specific when I received it. Because this would be a form accomplished after the man was received in the jail subsequent or almost immediately subsequent to March of 1953, it would therefore relate to what his condition was at that time.

[fol. 779] I must be honest with the Court and say, how-

ever, I do not have the man available who physically received it.

Mr. Ackerly: Of course, we object to that, Your Honor. Unless the man who took it is present to testify, we have a strong objection. Even if he were here, I submit the purpose for which it is being offered is squarely within the Lyles decision in our Court of Appeals and therefore would not be appropriate even if the man were here.

But we have a stronger even, double-barreled objection—

Mr. Smithson: Of course, it would not be in Lyle, Your Honor. It is in the nature of a statement, not in the nature of a diagnosis or opinion of the man taking it. I realize counsel's objection if it contained his opinion as to his guilt or innocence, ability or lack of ability.

Mr. Ackerly: That is what it is being offered for, to establish his ability or lack of abilities. I think it is in the Lyles case. Plus the fact the man who took it isn't here. We wouldn't have an opportunity to cross-examine him as to how long it took, as to the way the responses came out, whether he had any help from anybody, whether he had any other information.

The Court: I think the proffer will be rejected.

Mr. Smithson: Well, I wanted to make it with the Court. [fol. 780] Mr. Carey: Does that wind us up?

Mr. Smithson: I think it does.

Mr. Carey: We have nothing further.

Mr. Smithson: For the record, in front of the jury, I will announce the closing.

The Court: Yes.

Mr. Ackerly: We have prayers to submit, Your Honor.

Mr. Carey: What time do you expect to adjourn this morning? I will tell you why I ask. At eleven o'clock I am supposed to appear before Judge McGuire. It will only take a second. Does that suit the Court, that we adjourn at eleven? Or, I could do it now.

Mr. Smithson: Your Honor, I didn't mean to interrupt you. I would rather have counsel do it now. I don't want to stop my argument.

Mr. Ackerly: May we submit prayers at this time, Your Honor?

Mr. Carey: Mr. Ackerly can handle the prayers.

The Court: All right. You announce it.

Mr. Carey: Then I will be excused for a couple of minutes?

The Court: Yes. I want both sides to announce that they rest.

(Counsel returned to trial tables.)

[fols. 781-866] Mr. Smithson: The Government rests, Your Honor.

Mr. Carey: The defense rests, Your Honor.

The Court: Very well.

The jury will please keep in mind the admonition. Take a short recess. The Court will call you back. Please do not get too far away. You may please absent yourselves from the courtroom.

The Clerk: The jury step out of the courtroom, please.

(Thereupon, at 10:30 a.m., the jury left the courtroom.)

Mr. Ackerly: At this time, Your Honor, I would like to renew our motions heretofore made, including our motion for a judgment of acquittal and our motions for a mistrial. And also to add a motion for a mistrial based upon the testimony of Doctor Cushard and Doctor McIndoo.

The Court: Very well. Motion denied.

[fol. 867]

#### AFTER RECESS

(The Court reconvened at 3:05 p.m.)

The Marshal: Anyone wishing to leave the Court will leave now; otherwise, you will not be able to leave while the Judge is instructing the jury.

#### JUDGE'S CHARGE TO JURY

LETTS, J.: Ladies and gentlemen of the jury, the defendant, Willie Lee Stewart, stands charged in two-count indictment.

• The first count charges him with the crime of murder in the first degree.

The second count of the indictment charges him with the crime of robbery.

As to the first count of the indictment, you are told that it is provided by statute that: Whoever being of sound memory and discretion, in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the

penitentiary, or without purpose so to do, kills another in perpetrating or attempting to perpetrate any arson, rape, mayhem, robbery, or kidnapping, is guilty of murder in the first degree.

You are told that the punishment for murder in the first degree is death by electrocution.

As to count two of the indictment, you are told that it is provided by statute that: Whoever by force or violence, whether against resistance or by sudden or stealthy seizure [fol. 868] or snatching or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery. And any person convicted thereof, shall suffer imprisonment in the penitentiary.

The first count of the indictment specifies that on or about March 12, 1953, within the District of Columbia, the defendant, Willie Lee Stewart, did perpetrate a robbery, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, and did steal, take and carry away, off the person and from the immediate actual possession of Harry Honikman, four hundred sixteen dollars and seven cents in money, the property of Harry Honikman.

And while perpetrating the robbery, in the manner aforesaid, unlawfully and feloniously, did kill and murder said Harry Honikman by means of shooting him with a pistol, of which shooting Harry Honikman, on March 12, 1953, did die.

The second count of the indictment charges that on or about March 12, 1953, within the District of Columbia, the defendant, Willie Lee Stewart, by force and violence, and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, did steal, take and carry away off the person and from the immediate and actual possession of Harry Honikman, property of Harry Honikman of the value of four hundred sixteen dollars and seven cents [fol. 869] in money.

To this indictment, the defendant has entered a plea of not guilty as to each count of the indictment.

You are told that an indictment is not evidence in any degree whatever.

The purpose of an indictment is to inform the accused

of the offense with which he is charged. And the only use which may properly be made of the indictment by this jury is to determine the nature of the charge now made against the defendant.

You are told that, in the first instance, there is a presumption in law that the one who stands accused is not guilty of the offense with which he is charged. This presumption of innocence should prevail in the minds of the jury in such a way as to cause them to find the defendant **not** guilty unless, from all of the evidence in the case, the jury is convinced beyond a reasonable doubt that the defendant is, in truth and in fact, guilty.

The burden of proof rests upon the government, which means that, before this jury will be warranted in finding the defendant guilty on either count of the indictment, the government must prove, and the jury must find from the evidence, beyond a reasonable doubt, each of the essential elements of the alleged offense, as charged in such count of the indictment.

And, in addition thereto, before the jury will be warranted [fol. 870] in finding the defendant guilty on either count of the indictment, the government must prove, and the jury must find from the evidence, beyond a reasonable doubt, that the defendant was sane at the time it is alleged that the offense was committed.

A reasonable doubt means such a doubt as will leave the juror's mind, after a candid and impartial investigation and consideration of all of the evidence and of all of the facts and circumstances shown in the case, so undecided that the juror is unable to say that he or she has an abiding conviction of the defendant's guilt.

It is such a doubt as, in the graver and more important transactions of life, would cause a reasonable and prudent person to hesitate and falter. If the evidence failed to come up to this standard, it is such as to warrant such a doubt.

And, if you entertain such a reasonable doubt of the defendant's guilt, the law requires that you give the defendant the benefit of that doubt and acquit him.

The words "reasonable doubt" must be given their usual and ordinary meaning. The doubt must not be trivial or whimsical. It should not be based upon groundless conjecture and should not be sought after, but it must be a doubt

that arises naturally and fairly in the minds of the jury out of the evidence, or from a lack of necessary evidence. It [fol. 871] must be a doubt that appears to you to be reasonable in the circumstances of the case as shown by the evidence.

In addition to the general plea of not guilty, the defendant has interposed the plea of insanity. By this plea of insanity, the defendant asserts that on March 12, 1953, when it is charged that he committed the offenses mentioned in the indictment, he was suffering from a diseased and defective mental condition, and is not criminally responsible for the unlawful acts of which he is charged in the indictment, for the reason that such unlawful acts were the product of mental disease or mental defect.

When lack of mental capacity is raised as a defense to a charge of crime, the law accepts the general experience of mankind and presumes that all persons, including those accused of crime, are sane. But, as soon as some evidence of mental disease or mental defect is introduced, then the sanity of the defendant, like all other facts, must be proved as a part of the prosecution's case to the satisfaction of the jury beyond a reasonable doubt.

Since the burden of proof is on the prosecution from the beginning to the end of the trial, then this burden applies to every element necessary to constitute the crime charged.

If you, the jury, believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective [fol. 872] mental condition at the time he committed the criminal act charged, you may find him guilty, if you also find that the government has proved beyond a reasonable doubt all other essential elements of the crime charged.

If you believe he was suffering from a diseased or defective mental condition when he committed the act, but you believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty, if you also find that the government has proved beyond a reasonable doubt all other essential elements of the crime charged.

Unless you believe beyond a reasonable doubt, either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity.



Thus your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act.

These questions must be determined by you from the facts which you find to be fairly deducible from the testimony and the evidence in this case.

[fol. 873] We use "disease" in the sense of a condition which is considered capable of either improving or deteriorating. We use "defect" in the sense of a condition which is not considered capable of either improving or deteriorating, and which may be either congenital or the result of injury, or the residual effect of a physical or mental disease.

You are told that, if the verdict of the jury is not guilty by reason of insanity, the defendant will be confined in a hospital for the mentally ill until a superintendent has certified, and the Court is satisfied, that such person has recovered his sanity and will not in the reasonable, foreseeable future be dangerous to himself or to others, in which event, and at which time, the Court shall order his release, either unconditionally or under such conditions as the Court may see fit.

Evidence has been received that each of the two witnesses, Annie Lee Stewart and Betty Whorton, have been previously convicted of crime. Such evidence was not received as bearing upon the issues of the case, except that you may consider such evidence in connection with all other evidence and all facts and circumstances shown in the case in determining how much weight and credibility you will accord the testimony of the witnesses which have just been named.

At this point, I shall read to the jury an instruction which [fol. 874] has been asked by the defendant and granted by the Court. By granting it, the Court tells the jury that it is the law of the case:

You are instructed that a lay witness' observation of abnormal acts by an accused may be of great value as evidence, yet a statement that the witness never observed an abnormal act on the part of the accused is of value if, but only if, the witness has had prolonged and intimate contact with the accused:

The law makes this jury the sole judges of the credibility

of the witnesses and of the weight you will accord the testimony given by them.

You should give to each witness that degree of credit and effect which, in your honest judgment, you think it ought to have.

In coming to your conclusion as to what weight should be accorded the testimony of any particular witness, you may, and properly should, take into consideration in so far as you are able to do so, the manner and appearance of the witness when on the stand, and whether the testimony of the witness be frankly and honestly given. Also, what, if any, interest or lack of interest a witness may have in the outcome of the case, and whether, on that account, such witness has colored in any way the facts related in his testimony.

[fol. 875] If you find that any witness has knowingly testified falsely with respect to any matter material to the issues of the case, and concerning which the witness may not reasonably have been mistaken, you may, if you wish, disregard all or any part of the testimony of such witness.

The jury will take the case. You will retire to your jury room and deliberate upon your verdict.

When you have reached your verdict, you will return to the courtroom, and there let your verdict be announced by your foreman.

If the jury finds that the government has proved each of the essential elements as I have heretofore stated them, including defendant's sanity, to its satisfaction beyond a reasonable doubt, your verdict will be guilty as charged.

If the jury finds that the government has proved to the satisfaction of the jury beyond a reasonable doubt each of the essential elements as I have heretofore stated them, except the element of defendant's sanity, your verdict will be not guilty by reason of insanity.

If the government has failed to prove to the satisfaction of the jury beyond a reasonable doubt any essential element, as I have heretofore stated it, other than the element of defendant's sanity, then your verdict will be not guilty.

Let the alternates at this end move over.

Mr. Carey: Your Honor, may we approach the bench, if [fol. 876] Your Honor please?

The Court: Yes.

(At the Bench)

## COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Ackerly: Your Honor, we would like to renew our request for the prayers your Honor denied.

The Court: Request denied.

Mr. Ackerly: In describing reasonable doubt at the beginning, Your Honor, you said that if there is reasonable doubt, the law requires that you give the defendant the benefit and acquit him. That is the only time Your Honor used the word "acquit." I am not sure the Jury understood what you meant by it. I would object to it. I think maybe if Your Honor could explain that.

(The Court looked through papers before it.)

The Court: Now, what is your objection?

Mr. Ackerly: Well, you used the word "acquit" him, but the word "acquit" has not been explained. In every other place of your charge, you said not guilty at the end. In other words, you didn't say, "You may acquit him," you said, "You may find him not guilty." I think the Jury may not understand.

The Court: That I should tell them that acquit means not guilty—

Mr. Ackerly: I would just ask you to state—before, when [fol. 877] you said if they had a reasonable doubt about the elements of the crime, you said "acquit" him, you mean find him not guilty.

And then Your Honor said—

The Court: Wait a minute.

(The Court addressed the Jury as follows while counsel were still at the bench:)

The Court: The question has been raised whether the Jury would understand what I mean by the word "acquit." To acquit a defendant means to find him not guilty.

(The conference at the bench then proceeded as follows:)

Mr. Ackerly: Your Honor said that a reasonable doubt should not be sought after. Your Honor did not give the instruction normally given that if you can reconcile the evidence with any reasonable hypothesis, you must acquit. I take exception to your stating that a reasonable doubt should not be sought after.

I think the jury should, in applying the presumption of innocence, search the evidence and see if there is reasonable doubt.

In referring to the plea of not guilty, Your Honor said that in addition to the plea of not guilty, there has been a plea of insanity; I understood you to say that the defendant, on March 12, 1953, that he was suffering from a diseased and defective mental condition. That is what my notes reflect. I would object to that.

[fol. 878] The Court: Yes.

Mr. Ackerly: Your Honor said, "If you believe that the man was suffering from a mental disease or defect but the act was not the product of such disease or defect."

The Court: I am just quoting from Bazelon's opinion.

Mr. Ackerly: I think I can handle the point by excepting to that and renewing our request that you give our instruction on this point.

The Court: Yes.

Mr. Ackerly: I would take exception to Your Honor's instruction on the result of finding him not guilty by reason of insanity, and then urge that you give the instruction we submitted because Your Honor's instruction was not complete enough.

I would ask Your Honor again to point out to the jury, because Your Honor, I think, mentioned it once and only once at the very outset, that first degree murder requires that the person be of sound memory and discretion. You mentioned that only once, Your Honor, and that one element you did not explain, and this is one element of the crime. I would ask Your Honor to instruct, admonish the jury once more that one of the essential elements of first degree murder is that the person be of sound memory and discretion. [fol. 879] cretion.

The Court: Well, I have covered it once.

Mr. Ackerly: Your Honor, I understood you to say in describing mental disease or defect that if there was no "casual" connection instead of "causal" connection.

The Court: I have read Bazelon's instruction. I copied it verbatim.

Mr. Ackerly: Well, and then, in referring to the verdict, you said if the government proves everything beyond a reasonable doubt but not sanity. I think, Your Honor, you

should charge them at this point that the government must prove beyond a reasonable doubt, not sanity, but that he was not suffering from a mental disease or defect, because there are two different concepts of sanity and mental disease and defect; on that, I would take exception to that portion.

The Court: Yes.

Let the alternates at this end move down to the other end of the box, please.

(Counsel having returned to trial tables)

The Court: The jury will please retire and deliberate upon your verdict, and let me say to you: You will be in the custody of the Marshal until you have your verdicts.

So you may retire.

The Marshall: All right, ladies and gentlemen, follow me. [fol. 880] Mr. Carey: Your Honor,——

The Court: Yes.

Mr. Carey: I think one of the alternates is going with the group by mistake.

The Deputy Clerk: The alternates will remain in the courtroom.

The Court: The alternates stay here, please.

The alternates sit down there. Where are the other alternates?

Mr. Carey: They are all here but one.

Mr. Smithson: They are all here now, Your Honor.

(The alternates took seats in the jury box.)

The Court: Now, it is my pleasure to thank the alternates for their attendance, and I only regret that I couldn't have kept you a little longer.

You will be excused.

Thank you very much.

The Deputy Clerk: You will be excused until Monday. Return on Monday to your own courtroom.

(Accordingly, at 3:43 p.m., the jury retired from the courtroom.)

The Court: Send the jury paper and pencils and all the exhibits.

[fol. 881] The Marshal: You don't want the gun to go in there, do you?

The Court: Gentlemen, do you think it might be better if we keep the gun out?

Mr. Carey: I think so.

The Court: Is that agreeable?

Mr. Smithson: I'd just as soon not have any weapon in with the jury.

The Court: Then counsel and the Court agree that the gun will not go the jury.

Mr. Smithson: All right, Your Honor.

Mr. Carey: All right, Your Honor.

Mr. Ackerly: Your Honor, we would object to any exhibits going to the jury until they are asked for. They haven't asked for them. We would object.

The Court: They haven't been gone five minutes.

Mr. Ackerly: Well, that might be an important point, Your Honor.

The Court: Hold them up until they are called for. They will be called for in five or ten minutes.

Mr. Smithson: Bring them back now.

(To the Marshal.)

The Court: I thought Mr. Carey had agreed to it.

Mr. Ackerly: This is once chance I had to overrule him.

[fol. 882] Mr. Carey: I did, Your Honor, but it was disagreed.

The Court: Yes. All right.

The Court: Let's see, it's a quarter of four. We are going to have to stay around until five.

Where are you gentlemen going to be now.

Mr. Carey: We'll be around, oh, yes.

The Court: Nearby?

Mr. Carey: We'll keep in touch with Mr. Collins, the Clerk, Your Honor.

The Court: Yes. Mr. Collins, you keep track of everybody.

(Accordingly, at 3:48 p.m., the Court recessed. At 4:29 p.m., the Court reconvened, and the following proceedings were had:)



The Court: Let the record show that the defendant is present in Court and defense counsel.

Bring the jury in, please.

(The jury filed into the courtroom and stood in front of the jury box.)

# VERDICT

The Deputy Clerk: Mr. Foreman, has the jury reached a verdict?

The Foreman: We have, Your Honor.

The Deputy Clerk: What say you as to the defendant, Willie Lee Stewart, on count one?

[fol. 883] The Foreman: We find the defendant guilty.

The Deputy Clerk: On count two?

The Foreman: We find the defendant guilty.

The Deputy Clerk: Members of the jury, your foreman says that you find the defendant, Willie Lee Stewart, guilty as charged, and that is your verdict, so say you each and all!

Members of the Jury: Yes.

Mr. Carey: I'd like to have the jury polled, Your Honor.

The Court: Let the jury be polled.

The Deputy Clerk: Members of the jury, as I call your name, please state your individual verdict.

Mrs. Audrey Farr, what say you as to count one?

Juror Farr: Guilty.

The Deputy Clerk: Count two?

Juror Farr: Guilty.

The Deputy Clerk: Miss Iona Browne, count one?

Juror Browne: Guilty.

The Deputy Clerk: Count two?

Juror Browne: Guilty.

The Deputy Clerk: Garnett Barnett, count one?

Juror Barnett: Guilty.

The Deputy Clerk: Count two?

Juror Barnett: Guilty.

The Deputy Clerk: Miss Margaret Dixon, count one?

[fol. 884] Juror Dixon: Guilty.

The Deputy Clerk: Count two?

Juror Dixon: Guilty.

The Deputy Clerk: Harvey Boyers? Count one?

Juror Boyers: Guilty.

The Deputy Clerk: Count two?

Juror Boyers: Guilty.

The Deputy Clerk: Mrs. Dorothy Wagner, count one?

Juror Wagner: Guilty.

The Deputy Clerk: Count two?

Juror Wagner: Guilty.

The Deputy Clerk: Miss Pauline Baylor, count one?

Juror Baylor: Guilty.

The Deputy Clerk: Count two?

Juror Baylor: Guilty.

The Deputy Clerk: Moses Robinson, count one?

Juror Robinson: Guilty.

The Deputy Clerk: Count two?

Juror Robinson: Guilty.

The Deputy Clerk: Miss Bernice Ferris, count one?

Juror Ferris: Guilty.

The Deputy Clerk: Count two?

Juror Ferris: Guilty.

The Deputy Clerk: David Ford, count one?

[fol. 885] Juror Ford: Guilty.

The Deputy Clerk: Count two?

Juror Ford: Guilty.

The Deputy Clerk: Mrs. Anne Dorsch, count one?

Juror Dorsch: Guilty.

The Deputy Clerk: Count two?

Juror Dorsch: Guilty.

The Deputy Clerk: Mrs. Mary Facciolo, count one?

Juror Facciolo: Guilty.

The Deputy Clerk: Count two?

Juror Facciolo: Guilty.

The Deputy Clerk: The jury has been polled, and all con-  
cur in finding the defendant guilty as charged.

The Court: The Court receives the verdict.

The defendant will be committed for sentence.

The jury will be excused.

The Deputy Clerk: The jury is excused until Monday.  
Return to your own courtroom, Monday morning.

(At 4:33 p.m., the Court adjourned until 10:00 o'clock on  
Wednesday, November 26, 1958.)

[fol. 886] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14991

WILLIE LEE STEWART, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the District of Columbia

OPINION—February 16, 1960

Mr. Robert L. Ackerly (appointed by the District Court), with whom Mr. Edward L. Carey (also appointed by the District Court) and Mr. Walter E. Gillerist were on the brief, for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom Messrs. Oliver Gasch, United States Attorney, and Carl W. Belcher, Assistant United States Attorney, were on the brief, for appellee.

Before: PRETTYMAN, *Chief Judge*, and EDGERTON, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges*, sitting *en banc*.

BURGER, *Circuit Judge*, with whom PRETTYMAN, *Chief Judge*, and WILBUR K. MILLER, DANAHER and BASTIAN, *Circuit Judges*, join: This case comes to us for the third time after three trials in the District Court before three different judges and three different juries, and [fol. 887] after two earlier appeals to this court. This is the second review *en banc* by this court.<sup>1</sup>

In April 1953, Stewart was indicted for first degree murder and robbery of his alleged victim. The evidence of the robbery and killing in the record now before us is the same in all significant respects as in two prior trials and shows beyond any doubt, as this court has always

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<sup>1</sup> First conviction reversed July 15, 1954; second conviction reversed April 18, 1957. See *Stewart v. United States*, 94 U.S.App.D.C. 293, 214 F.2d 879 (1954); *Stewart v. United States*, 101 U.S.App.D.C. 51, 247 F.2d 42 (1957).

acknowledged, that Stewart committed the acts charged.<sup>2</sup>

Harry Honikman, age 65, operated a small corner grocery store in Washington where on March 12, 1953, late in the evening, Stewart entered and made purchases. When the proprietor told Stewart it was closing time the latter drew a pistol and said "Okay, this is it," and demanded the contents of the cash register. He then shot Honikman, killing him instantly. The wife and daughter of the deceased witnessed the shooting. Their positive identification of Stewart was first made in a police line-up and has never been shaken in the course of three trials.<sup>3</sup> [fol. 888] Stewart then took about \$400 from the cash register and fled. Apart from identification by the eye witnesses, Stewart's gun was identified as the murder weapon by expert testimony. Stewart was apprehended two days later and arrested while attempting to elude police pursuit. He had been hiding meanwhile.

In the first two trials, in 1953 and 1956, Stewart did not take the stand. His principal defense in those trials was, as in the trial now under review, that he was suffering from a mental disease or defect when he committed the crime. In the third trial, unlike the two earlier trials, Stewart took the stand and his testimony, if it can be so described, is gibberish without meaning. It is such that it permits of only one of two conclusions: either he was

<sup>2</sup>Writing the opinion for a unanimous court (Edgerton, Bazelon and Washington, Circuit Judges) reversing the first conviction, Judge Bazelon said: "There is not the slightest doubt from the evidence, however, that he [Stewart] committed the offense." *Stewart v. United States*, 94 U.S.App.D.C. 293, 294; 214 F.2d 879, 880 (1954).

<sup>3</sup>Writing the principal opinion in the reversal of the second conviction, Judge Bazelon (with whom Edgerton, Fahy and Washington, Circuit Judges, concurred) said: "In both trials the evidence made it unmistakable that, if the appellant was legally sane, he was guilty of the homicide charged against him. His principal defense, however, was insanity." 101 U.S.App.D.C. 51, 52; 247 F.2d 42, 43 (1957).

<sup>4</sup>Mrs. Beky Honikman died prior to the instant trial, and her testimony has been received since then by transcription of her statements at the first trial.

suffering from a grave mental disease or defect during the trial, in which case he could not be legally tried at all, or he was malingering—staging a show of mental aberration to influence the judge and jury.

In these circumstances it becomes necessary to deal separately with the mental condition of Stewart on March 12, 1953, when the crime was committed, and his mental condition in 1959, when he was tried for the third time. The Government affirmatively attacked appellant's conduct on the witness stand as deliberate malingering.

Stewart has been in custody since his arrest in 1953 and by direction of the court has been in St. Elizabeths Hospital for long periods of observation and examination to determine his mental condition first as of March 1953 and second as to his capacity to be tried. The criteria for these evaluations are, of course, not the same. *Carter v. United States*, 102 U.S.App.D.C. 227, 252 F.2d 608 (1956); *Lyles v. United States*, 103 U.S.App.D.C. 22, 254 F.2d 725 (1957), cert. denied, 356 U.S. 961 (1958).

That every member of this court has previously acknowledged that there is no question but that Stewart committed the criminal acts charged does not alter our obligation to examine the record before us as to all the issues. The [fol. 889] very purpose of a new trial on each occasion was to afford him all the procedural safeguards guaranteed to every accused. But once having scrutinized the present record with the degree of care appropriate in a capital case, and having satisfied ourselves that there is no doubt, reasonable or otherwise, that Stewart committed the acts charged and that he was afforded a fair trial, our detailed analysis of those issues on prior occasions and the unanimous conclusions concerning them render it unnecessary to discuss anew whether Stewart indeed committed the acts. Now, as at all times previously, we are fully satisfied on this score. We therefore address ourselves to what has been called Stewart's "principal defense," his claim of insanity, and to related issues.

(1)

The evidence bearing on the defense of insanity at the time of the crime falls into three categories: (1) lay testimony as to Stewart's behavior and activities on the day

of the crime; (2) lay testimony as to Stewart's conduct, behavior and mental condition over a period of time preceding the crime, including two terms of military service; (3) expert medical testimony based on examination, observation and on facts established by competent evidence, facts deducible from competent evidence and on facts assumed to have been established.

The Government produced James Hamilton, a friend and neighbor of Stewart, who had known him for six years; he testified that on the day of the crime he and Stewart along with others played cards at Stewart's home most of that day, the game starting before the crime and continuing into the evening after the robbery and killing. That the acts charged were committed by Stewart during an absence from the card game was, of course, unknown to Hamilton or the other players. During the early evening Stewart showed Hamilton an Iver Johnson pistol [fol. 890] which the latter examined and found loaded. At the trial this pistol was identified by ballistic experts as the murder weapon. Stewart rejoined the card game following the interval during which the crime was committed and continued to play until 2 A.M. the next morning. Hamilton said Stewart's conduct and actions both before and after his return to the game late in the evening were normal and not in any way unusual, excited or out of the ordinary.

Stewart's history of prior conduct was testified to in his behalf by his wife, several relatives and several friends. Together they portrayed Stewart as a man of maniacal tendencies, given to outbursts of violence, throwing and smashing property in senseless rages, maltreating his wife and children generally, beating his wife during a pregnancy; it was claimed that he attempted to shoot her, attempted to throw his child out a window when the child annoyed him, attempted or threatened to put the child in a stove. His military record included two terms, the second one ending in a suspended dishonorable discharge after a suspended sentence on conviction for assault by a military court. His Army I. Q. test showed a score of 63 on the verbal sub-test and 76 on the performance sub-test with a combined score of 65. Army medical reports yielded no evidence of neurosis or psychosis.



There was no record of any charges made to police by Stewart's wife or others by reason of the alleged abnormal and brutal conduct described by his relatives and friends. On the contrary, his employer said he was an excellent employee and that as a worker he "can't be beat."

The medical expert called by the defense was Dr. Ernest Williams, who first examined Stewart while he was in custody three months after the crime, seeing him for about two hours. This witness found Stewart in a depressed state [fol. 891], and was unable to form an opinion as to the presence or absence of a mental disease or defect. However, accepting as true the history of violence described by Stewart's wife, relatives and friends, Dr. Williams reached the conclusion that Stewart was suffering from manic depressive psychosis when he committed the crime. Later, in 1958, Dr. Williams again examined Stewart and found evidence of symptoms of schizophrenic psychosis. Dr. Williams said that Stewart then was suffering or had suffered from schizoid affective psychosis. In addition, he said Stewart suffered from a mental defect, basing his opinion on the I.Q. test scores, which he said put Stewart in the moron category.

Dr. Williams conceded that his opinion as to Stewart's mental disease was based on the assumed truth of the history of violence and he further conceded that if the history of the abnormal conduct described by friends and relatives was not based upon truth, his diagnosis was faulty. Stewart's neighbor Hamilton, who had extended opportunities to observe, as has been pointed out, gave testimony which the jury might have decided was inconsistent with the alleged history of senseless violence and abnormal rages. Hamilton testified he had observed no abnormal conduct except on one occasion when Stewart was intoxicated. That this witness did not observe any of the uncontrollable senseless rages or compulsive violence described by Stewart's other friends and his relatives, is, of course, significant. It plainly affords a basis, along with other evidence, for the jury to discount or even to disbelieve some of Stewart's defense witnesses.

In rebuttal, the Government called Drs. Kle and Kleinerman, of the staff of St. Elizabeths Hospital, who had examined appellant 14 and 13 days, respectively, after the alleged crime. These psychiatrists related that appellant

had given then an adequate history for diagnostic purposes, including details of his early life, his army career, his schooling, and details of his family and family life. They testified appellant behaved quite normally at these [fol. 892] interviews. Each doctor testified that he found no evidence of neurosis, psychosis, or mental defects, and each asserted that if these conditions had been present 13 and 14 days after the crime, they would have observed them. At these examinations Stewart was given simple reading and arithmetic problems, which he solved with difficulty but correctly. When questioned about the results of appellant's Weschler-Bellevue tests<sup>4</sup> both doctors said that these tests were not definitive with regard to mental defects. Dr. Klein expressed the view that a person with substandard education might easily be classified as a moron since the tests demand a certain educational background in order to accomplish the measuring process; Dr. Kleinerman felt that appellant's limited education would adversely affect his score on the verbal sub-tests, but would not seriously affect the performance sub-tests, on which Stewart obtained a 76, within the low-average category. Dr. Klein characterized Stewart's condition as mental retardation, but not mental defect. He considered the 76 score more significant than the 63 score.

All this testimony was presented to the jury under careful instructions by the trial judge. As in the two preceding trials, the jury rejected the claim that Stewart was insane when he committed the crime.

(2)

Before the trial, Stewart was examined by his own psychiatrist, and by government psychiatrists, and a hearing was held by the trial judge to determine whether Stewart was competent to stand trial. At that hearing,

<sup>4</sup>The Weschler-Bellevue tests have largely replaced the Stanford-Binet tests as measuring "intelligence." They are made up of a series of sub-tests which evaluate individual facets of intelligence, i.e., vocabulary, arithmetic, rote memory, social judgment. Each facet is then scored, and an "average" score deduced. See GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 175 (1952).

[fol. 893] Dr. Williams testified he had recently examined appellant and that appellant gave unresponsive and incoherent answers. He said Stewart could not give details of his family life, could not recognize the name of the President of the United States, that he claimed he heard voices that threatened him, etc. Dr. Williams characterized appellant's attitude as one of complete withdrawal. On this basis, Dr. Williams felt that appellant could not assist in his own defense as he was suffering from schizoid affective psychosis. Dr. Williams also said he tested for malingering, and concluded that Stewart was not feigning insanity. Appellant's Army record, with his I.Q. scores and court-marital history were before the court in this pretrial hearing.

In rebuttal, the Government called Dr. McIndoo, a psychiatrist who had examined appellant shortly before pretrial hearing, and who had observed him for several periods. Mr. McIndoo was unable to get a complete history from appellant, since he was not communicative at the time of the examination. But, on the basis of certain simple tests which were made and on the basis of reports from other hospital staff personnel, who had prolonged observation and to whom Stewart had given details of his past history, this expert concluded that appellant was malingering. Dr. McIndoo stated that testimony at the two previous trials supported her conclusion. After consideration of the evidence developed at the hearing, the trial judge held Stewart was competent to stand trial.

During the course of the trial which followed this pretrial hearing, and after Stewart had testified in a bizarre, incoherent manner, the Government called two non-medical witnesses who testified to appellant's conduct and mental capacity as evidenced over a period of some years prior to the trial date. An attendant from St. Elizabeths, Earl Jones, testified he had seen Stewart at least 4 days each week since 1957, that Stewart had related his family [fol. 894] history to him, that he was a "model patient," that Stewart never told him of any hallucinations or delusions, and that appellant played whist and checkers with others at St. Elizabeths. Robert Depro, a guard at the jail who had seen Stewart regularly over a 4 year period stated that during this period appellant filled out certain forms for requests addressed to prison officials, some of which were fully printed, needing only appellant's signa-

ture, and some others demanding the writing of the request by Stewart. At one point appellant requested more work to keep him busy, and at another time Stewart was quite upset about his child being sick. Stewart never told Depro about any delusions or hallucinations.

Dr. William Cushard, a St. Elizabeths staff psychiatrist who had observed appellant during 1957 and 1958, saw no evidence of either manic-depression, or of schizoid affective psychosis or mental disease. It was his opinion that appellant was malingering.

(3)

Appellant asserts numerous errors relating to the insanity defense.

(a) The first contention is that the testimony of Drs. McIndoo and Cushard, and attendants Jones and Depro, all of whom testified to appellant's mental condition at a time appreciably *after* the commission of the crime, was erroneously received since it was not used by the witnesses "as part of the data upon which [they] . . . base a conclusion as to mental condition at the time of the offense."<sup>5</sup> It is argued this evidence was irrelevant, and that its impact produced prejudicial error requiring reversal.

While it is true that the primary issue is the accused's mental condition at the time of the offense, evidence as [fol. 895] to his mental condition at other times becomes relevant when it is related and submitted under proper instructions. Ordinarily the mental condition of the accused at the time of trial may not be shown, and the jury may not be advised that he has been judicially found competent to stand trial. But where the accused has been found competent to stand trial after appropriate proceedings, and the accused takes the stand and exhibits bizarre symptoms and abnormal behavior, which if truly reflecting his mental state would make a trial legally impossible, we have a different situation. The accused has then by his demeanor put his mental condition as of the time of trial in

<sup>5</sup> Lyles v. United States, 103 U.S.App.D.C. 22, 27, 254 F.2d 725, 730 (1957).

issue.<sup>6</sup> In that situation the Government may then undertake to show that the witness is acting a part rather than that his demeanor on the stand reflects his true mental state. Such conduct if dishonest might be directed to make a trial impossible or it might be directed primarily to influence the jury in passing on the defense of insanity. In those circumstances the Government may introduce evidence of the conduct and demeanor of the witness outside the courtroom and try to demonstrate that, away from the courtroom and before the trial, the conduct of the accused was that of a normal and rational person. See *State v. Lyles*, 351 Mo. 1174, 1179, 175 S.W. 2d 587, 588, (1943), where the court observed: "Feigning of insanity by a defendant may be shown on the theory that it amounts to a species of fabrication of evidence. . . ." See also *Waller v. United States*, 179 Fed. 810 (8th Cir. 1910).

The reason for Stewart's testifying in this extraordinary manner is not difficult to discern. His court appointed counsel, whose conduct we do not impugn, had advised the court that they could receive no help from Stewart in preparing a defense. Appellant's responses to his psychiatrist were the same as to his court appointed lawyers. At the pretrial competency hearing already referred to, appellant's psychiatrist vividly described the incoherent, unresponsive answers which Stewart gave when interviewed, foreshadowing his testimony on trial. The government psychiatrist told of similar difficulties, but pointed out that other hospital personnel had been able to converse normally with appellant and obtain normal responses when he was not aware he was under observation. It was thus clear that, put into a situation where his answers to relevant questions might tend to harm him, Stewart either could not or would not cooperate. In this posture, the Government was, of course, entitled to rebut the impression of madness which a cunning actor might convey to a jury; low intelligence does not rule out cunning efforts to survive.

<sup>6</sup> "For the demeanor of an orally testifying witness is 'always assumed to be in evidence.' It is 'wordless language.'" Frank, J., in *Broad Music, Inc. v. Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80 (2d Cir. 1949).

To meet this, responsible psychiatrists flatly testified that, in their opinion, Stewart was malingering. Added to this was testimony by hospital and jail attendants who had extended opportunity for observation and who had seen appellant in the period before trial, when his conduct was that of a model prisoner, showing none of the bizarre behavior or incoherent babblings demonstrated in the courtroom. Such rebuttal evidence was plainly competent, relevant and admissible.

In the area of the medical testimony another ground for reversal is urged. Direct examination of Dr. Williams had disclosed he had studied under a Dr. Karpman; on cross examination Dr. Williams was asked if he was a follower of Dr. Karpman. Dr. Williams said he was, "not a follower, but studied under him." He was then asked if he knew and subscribed to Dr. Karpman's view that "every time a person commits a crime that that person is suffering under some mental disorder?" Dr. Williams responded that Dr. Karpman had never expressed such a view to him and in any event that he, Dr. Williams, did not subscribe to that view. This was within the bounds [fol. 897] of proper cross examination; moreover, it produced nothing except a positive disavowal by the witness of the viewpoint attributed to Dr. Karpman.

The final point urged concerning the insanity defense is that the District Court erred in refusing to instruct that where the evidence shows the accused is mentally defective in the sense of being below the level of low normal intelligence and in the category of moron, the jury may consider that intelligence level in arriving at its verdict. It is urged that the jury must be instructed that if this condition of low intelligence is found to exist the jury may then return a verdict of a lesser degree of homicide, e. g., second degree murder, since the accused lacks the sound memory and discretion to be guilty of murder in the first degree. By reference appellant incorporated comprehensive arguments on this subject which were urged on this court in recent cases.<sup>7</sup>

<sup>7</sup> Most forcefully in *Bloeker v. United States*, No. 14274, D.C.Cir., June 25, 1959; *Stewart v. United States*, 94 U.S. App.D.C. 293, 214 F.2d 879 (1954).



This is sometimes called the "doctrine" of diminished responsibility and it embraces the concept that punishment should be diminished where the defendant's intellect is diminished or less than a stated norm.<sup>6</sup> Perhaps there is some doubt whether it should be called a doctrine; rather it is a theory advanced to, but as yet not accepted by, the federal courts. Under this theory an otherwise guilty person would not be excused or relieved of punishment but would receive a *reduced* penalty because his comprehension of the nature of his act is presumably less than that of a person of higher intelligence who commits a like criminal act. It goes in part to the alleged lack of ability of the accused to plan, contemplate, deliberate or mediate in advance of the act and to formulate purpose and design.

As suggested this concept has been urged upon this court in one form or another in numerous cases commencing [fol. 898] as far back as 1882.\* The latest comment by this court on this concept was as recently as in the opinion on the reversal of Stewart's first conviction where it was said:

... We have concluded that reconsideration of our decision in *Fisher v. United States*, rejecting the concept] should wait until we can appraise the results of the broadened test of criminal responsibility which we recently announced in *Durham v. United States*. Only upon such an appraisal will it be possible to determine whether need for the rule remains.<sup>7</sup>

Apart from the very brief span of five years since we expressed this view, there are more compelling reasons

\* See *Guiteau's case*, 10 Fed. 161, 182 (1882); *United States v. Lee*, 4 Mackey 489 (1886); *Bolden v. United States*, 63 App.D.C. 45, 69 F.2d 121 (1934); *Fisher v. United States*, 80 U.S.App.D.C. 96, 149 F.2d 28 (1945). *aff'd* 328 U.S. 463 (1946).

<sup>7</sup> *Stewart v. United States*, 94 U.S.App.D.C. 293, 297, 214 F.2d 879, 883 (1954).

why a majority of this court are not now willing to adopt this concept of criminal responsibility.<sup>10</sup>

The problem of classifying, assessing and analyzing the results of the application of modern psychiatry to administration of criminal law as it relates to gradations of punishment according to the relative intelligence of the [fol. 899] defendant is beyond the competence of the judiciary. Courts are neither trained nor equipped for this delicate and important task. The basic framework for sentences of punishment must be established by the legislative branch. Indeed, one can hardly conceive of a process less suited to formulating general rules in this sensitive area, than an adversary proceeding. That must be done by long range studies by competent public and quasi-public entities and by legislative committees with trained staffs aided by objective technical and scientific witness who can deal with all aspects of the problem, not confined as we are to the facts of an individual case. In this process legislative committees can call upon the best scientific resources of the country without limit as has been done in studies conducted by Royal Commissions in England and Canada.

We reject the argument that it was error for the trial court to decline to give the requested instruction that evidence of diminished intellect would permit the jury to return a verdict of a lesser degree of homicide than first degree murder.

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<sup>10</sup> The concept relies essentially on intelligence tests which are acknowledged by responsible psychologists and psychiatrists to be guides not absolutes in determining true intelligence or mental capacity of a human being. The results of these tests can vary materially depending on the education, training and environment of the subject. Guttmacher and Weihofen state: "The authors are in agreement with the general view of psychiatrists that at no time does the intelligence test, or any other psychological test, alone establish the diagnosis. They are ancillary devices of the greatest value, but they cannot replace sound clinical judgment."

GUTTMACHER & WEIHOFFEN, *Psychiatry and The Law* 179 (1952).

The dissenting opinion urges that we should reverse and grant Stewart a new trial solely because of the prosecutor's question as to whether appellant had taken the stand in any prior trial. *Raffel v. United States*, 271 U.S. 494 (1926) dealt with this question when it was certified to the Supreme Court by the Sixth Circuit in this form: "Was it error to require the defendant, Raffel, offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial?" The Court's answer to this certified question was in the negative. "The safeguards against self incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *Raffel v. United States*, *supra* at 499.

Here, Stewart, who had not taken the stand in either of two prior trials, did so in his third trial in a manner [vol. 900] which, as we pointed out earlier, indicated either that he was incompetent to be tried or he was malingering. The conduct of a witness on the stand is, of course, a form of testimony; his demeanor is always in evidence when he testifies. In those circumstances the credibility or genuineness of that "demeanor-evidence" is open to testing by conventional methods including cross examination. In this context, the prosecutor's question was prefatory in nature and directed to reveal whether Stewart had conducted himself in this manner in any prior trials.<sup>11</sup>

<sup>11</sup> An obvious and valid explanation as to why the government did not pursue the cross examination on this score is that appellant's need to preserve the "calculated" appearance of insanity frustrated cross examination at the threshold. Indeed, appellant never answered the question. We should also remember that it was defense counsel, not the prosecutor, who first brought out that appellant had been tried previously. One defense counsel was permitted to sit in the witness chair and read answers to questions read by his co-counsel from the transcript of an earlier trial and the source of this material was explained to the jury as testimony from appellant's prior trial.

By his demeanor on the stand appellant was offering a form of evidence which he had not offered in prior trials. Hence like other new evidence not offered in a previous trial, this evidence was open to examination and testing; the prosecutor was entitled to probe as to why it was not previously tendered. The logical and permissible first step under *Raffel v. United States, supra*, was to have him say whether he had previously testified in order to lay the groundwork for developing an inconsistency inherent in the difference in his "demeanor-evidence" in the two trials. Of course, appellant would be free to show, if he could, through other witnesses called by his counsel, that the onset of the bizarre behavior was of recent origin and this in turn would tend to explain, if not rebut, the seeming inconsistency.

[fol. 901] *Gruncwald v. United States*, 353 U.S. 391 (1957), in which the Court explicitly distinguished *Raffel v. United States*, did not deal with this problem. *Gruncwald* considered whether the affirmative assertion of the Fifth Amendment before a *Grand Jury* under subpoena compulsion and without counsel could be brought out when the witness took the stand in his own behalf when on trial in the District Court. The error in permitting this to be done lay in the trial court's treating the *Grand Jury* proceeding the same as a prior trial.

The dissenting opinion seems to suggest that the challenged question bears on the "insanity defense" but does not make clear how that is so. As we see it, the challenged question bears on appellant's credibility and in some degree on whether he was guilty of the acts charged. In essence the dissent is taking issue with the basic holding of *Raffel v. United States* but until the Supreme Court alters the holding in that case we are bound by it.

That this court does not lightly or casually examine the records of trials where the death sentence is imposed is attested by the fact that appellant has had three trials by our direction. Moreover, it is a long time since any death sentence has been affirmed by this court except with the court sitting *en banc*. Because of the gravity of our responsibility in a capital case we have on this appeal examined into every aspect of the record of the trial under review, not confining ourselves to the errors as-

signed by very able and experienced trial counsel and not limited to those discussed in this opinion. That three trials and two prior appeals have engaged the time and attention of the courts of this jurisdiction over a period of nearly seven years, does not diminish in the slightest our obligation to scrutinize the record of the particular trial which is now before us. It is the judgment with its concomitant sentence in the third trial, no other, which is now before us and which must satisfy us.

From what has been stated it can be seen that the record concerning the defense of insanity discloses some [fol. 902] evidence which would suggest the appellant was legally insane on March 12, 1953, along with other evidence which would suggest he was not. The lay witnesses who testified to abnormal conduct and irrational behavior were relatives and friends. Other laymen with substantial opportunity to observe Stewart over a long period, including a personal friend of long standing, did not observe irrational or abnormal conduct. See *Carter v. United States*, *supra*, at 237, 252, F.2d at 618. Two psychiatrists whose observations began within two weeks of the crime categorically testified appellant was not suffering a mental disease or defect on March 12, 1953. One psychiatrist called as a defense witness testified to the contrary but his opinion was expressly dependent in a large part on the truth of disputed testimony of irrational behavior prior to March 1953.

The disputed facts and conflicting expert opinions were properly submitted to a jury under instructions which were correct. The 12 jurors in the instant case, like 24 jurors before them, have rejected his claims and have found appellant guilty.

Our close scrutiny of this record reveals no error which would warrant reversal and the judgment is therefore

*Affirmed.*

FAHY, *Circuit Judge*, with whom EDGERTON, *Bazelon*, and WASHINGTON, *Circuit Judge*, join, *dissenting*: Although the case has previously been before us twice, *Stewart v. United States*, 94 U.S. App. D.C. 293, 214 F.2d 879, and *Stewart v. United States*, 101 U.S. App. D.C. 51, 247 F.2d 42, the judgment of death by electrocution no

less now than before calls upon us to examine the record with the utmost care to determine whether or not there is serious error. There is I think serious error in the respect now to be explained.

[fol. 903] Defendant had not testified on either of his two trials which preceded the one now under review, but he did testify on this trial. His behavior on the witness stand was probably calculated to support his defense of insanity.

In the conclusion of his cross-examination by the prosecution the following occurred:

"Q. Willie, you were tried on two other occasions.

A: Well, I don't care how many occasions, how many case—you say case. I was a case man once in a time.

Q: This is the first time you have gone on the stand, isn't it Willie?

A: What?

Q: This is the first time you have gone on the stand, isn't it, Willie?"

Defendant's counsel immediately moved for a mistrial because of this reference to defendant's failure to testify before, a reference which counsel characterized as highly prejudicial. The motion was denied. Counsel subsequently renewed this motion at the conclusion of all the evidence, and also made the prosecutor's reference a basis on which he moved for a new trial.<sup>1</sup>

Unless the decision of the Supreme Court in *Raffel v. United States*, 271 U.S. 494, permitted this comment the ruling of the trial court was error. The failure of an accused to testify creates no presumption against him, and in aid of preventing such presumption from arising the rule is that the prosecution may not comment upon

<sup>1</sup> The majority opinion points out in a footnote that defense counsel brought out that defendant had been tried previously. The suggestion that this meets the defense objection is a *non sequitur*; for the objection was not to development of the fact of previous trials but development of the fact that defendant had availed himself at the previous trials of his privilege not to testify.



the exercise by an accused of his right not to testify. *Johnson v. United States*, 318 U.S. 189; *Bruno v. United States*, 308 U.S. 287; *Wilson v. United States*, 149 U.S. 60; *Milton v. United States*, 71 App. D.C. 394, 110 F.2d 556.

We note in the first place that though it included a question, the incident also included a statement that defendant had failed to testify on previous trials, and a clearly implied hostile comment on that failure. The comment had no relevance or materiality whatsoever to any issue of fact bearing directly upon the question of defendant's guilt or innocence, including of course the question of his sanity. Therefore, unless under the *Raffel* decision it bore on his credibility, it had no place in the case and violated the rule to which we have referred.

In *Raffel* the Supreme Court held that when on a second trial the accused took the stand and denied making a statement attributed to him by a prosecution witness, which he had not denied making on a previous trial at which he had not offered himself as a witness, he could be cross-examined so as to disclose his failure to testify at the first trial and why he had not done so. In passing upon that precise situation the Court said that when one waives his immunity by taking the stand, as *Raffel* had done on his second trial, he may not resume the immunity at will when cross-examination becomes inconvenient or embarrassing. The Court pointed out that the cross-examining questions must be relevant, and the Court conceded, without deciding, that if the defendant had not taken the stand on the second trial evidence that he had claimed immunity on the first trial would not be probative of any fact in issue and would be inadmissible. The Court held, nevertheless, that the questions asked *Raffel* when he took the stand on the second trial were relevant and competent because they bore upon his credibility. The Court explained this by pointing out that a witness who upon direct examination denies making statements relevant to an issue may be cross-examined with respect to conduct on his part inconsistent with such denial. [fol. 905] The *Raffel* decision was analyzed by the Supreme Court in *Grunewald v. United States*, 353 U.S. 391. There the Court held that *Raffel* should not be read either (1) as dispensing with the need for preliminary scrutiny by

the trial judge as to whether an earlier exercise of the Fifth Amendment privilege, in *Grunewald* before a grand jury, involved such inconsistency with defendant Halperin's later trial testimony as to permit the claim of the privilege to be used against him for impeachment purposes, or (2) as establishing as a matter of law that the prior claim of privilege with reference to a question asked at his later trial is always to be deemed a prior inconsistency. On the contrary, the Court described the holding in *Raffel* to be "that a defendant's failure to take the stand at his first trial to deny testimony as to an incriminating admission could be used on cross-examination at the second trial, where he did take the stand, to impugn the credibility of his denial of the same admission." 353 U.S. at 418.

The prior claim of privilege by Halperin was considered by the Court not to be inconsistent with testimony he later gave on his trial. Therefore, the Court held, *Raffel* did not authorize examination of Halperin as to his assertion of privilege before the grand jury. At least, the Court said, the probative value of such an inquiry on the issue of credibility was so negligible as to be outweighed by its possible, and impermissible, impact on the jury. The Court thereupon said it was not faced with the necessity either of deciding whether *Raffel* had been stripped of vitality by *Johnson v. United States, supra*, or of otherwise re-examining *Raffel*. Mr. Justice Black, with the concurrence of the Chief Justice, Mr. Justice Douglas, and Mr. Justice Brennan, expressed the view that *Raffel* "should be explicitly overruled." 353 U.S. at 426.

In our case the government does not even contend that the defendant's failure to take the stand on earlier trials was inconsistent with any particular testimony he gave on this trial. The government suggests that the defendant's "endeavor at the latest trial to manifest a disordered mind" was inconsistent with his "past abstention from taking the witness stand." The prosecutor made no such suggestion to the jury, and I see no basis for such a suggestion. The only function of the prosecutor's remark was to bring home to the jury that the defendant had previously availed himself of his privilege, and to suggest to the jury the inference that he would not have done this if he had not been sane and guilty. He was entitled

to exercise his privilege without being subjected, either then or later, to such a suggestion. Nor does anything in the record suggest that the question was prefatory in nature. The prosecutor's inquiry was a parting and final shot not prefatory to further inquiry.

Even were it possible to construe the comment as a reference to earlier "demeanor" inconsistent with defendant's later demeanor in testifying on this trial, to permit the comment would destroy the rule to which the *Raffel* credibility doctrine is a limited exception. *Raffel* involved prior conduct inconsistent with a particular item of *Raffel*'s later testimony, not an inconsistency between testifying and not testifying. I think the prosecutor could not under the applicable rule suggest to the jury, as the majority seems to say was done, that unless defendant were sane and, therefore, guilty, he would have testified at his previous trials and would not now be so conducting himself on the stand as to try to convince the jury he was insane. This is the sort of comment upon a failure to testify which I think is prohibited because it would seriously impair the privilege.

When the defendant chose to testify, and thereby waived ~~his~~ immunity to cross-examination, the waiver extended only to relevant matters. His failure to testify on his previous trials does not qualify under that standard. Accordingly, the prosecutor's comment was prejudicial without being competent. It did not bear, or even purport to bear, on the defendant's credibility. Even if [fol. 907] it had been relevant in some vague way to credibility, it would still have been inadmissible under *Grunewald*, because, especially in a capital case such as this, any possible probative value of the comment would have been far outweighed by its very probable, and entirely impermissible, impact on the jury. See *Grunewald v. United States*, *supra* at 420 and 424.<sup>2</sup>

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<sup>2</sup> In *Raffel* the accused was charged with conspiracy to violate the National Prohibition Act. Moreover, the questioning about *Raffel*'s failure to testify at his first trial was by the court, not by the prosecuting attorney.

Since a majority of the court affirm the judgment of conviction I do not pass upon the question whether the prosecution sustained the burden of proving beyond a reasonable doubt that defendant was sane at the time of the homicide—a question I would be required to decide were the conviction set aside and the case remanded. Silence on the issue of sanity is not to be construed as agreement with the majority position in that regard.

I would reverse and remand for a new trial.

[fol. 908] UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA Circuit, September Term, 1959

Criminal 633-53

No. 14,991

WILLIE LEE STEWART, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the  
District of Columbia

Before: PRETTYMAN, *Chief Judge*, and EDGERTON, WILBUR  
K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHY, BAS-  
TIAN and BURGER, *Circuit Judges*, sitting en banc.

JUDGMENT—February 16, 1960

This cause came on to be heard en banc on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Burger.

Dated: February 16, 1960.

Separate dissenting opinion by Circuit Judge Fahy with whom Circuit Judges Edgerton, Bazelon and Washington join.

[fol. 909] UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT, September Term, 1959

ORDER DENYING PETITION FOR REHEARING IN BANC—March  
30, 1960

Upon consideration of appellant's petition for a rehearing in banc, it is

Ordered by the court that the petition for rehearing in banc is denied.

Per Curiam.

Dated: March 30, 1960.

Circuit Judges BAZELON and FAHY would grant the petition for rehearing in banc.

[fol. 910] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA  
PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—June  
13, 1960

On petition for writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1003.

And it is further ordered that the duly certified copy of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 13, 1960.

PETITION NOT PRINTED

Office Supreme Court, U.S.

FILED

DEC 4 1960

JAMES R. BROWNING, Clerk

## IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 143

WILLIE LEE STEWART,

*Petitioner,*

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## PETITIONER'S BRIEF

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# INDEX

## SUBJECT INDEX

### PETITIONER'S BRIEF:

	Page
I. Opinion Below .....	1
II. Jurisdiction .....	2
III. Statutes Involved .....	2
IV. Questions Presented .....	2
V. Statement of the Case .....	3
VI. Argument .....	7
The Prosecutor Committed Prejudicial Error When Cross-Examining the Defendant by Stating Twice, "This Is the First Time You Have Gone on the Stand, Isn't It, Willie?" .....	7
(1) What was the testimony that the prosecutor allegedly sought to impeach .....	7
(2) Was there a real, material, inconsistency between defendant's demeanor evidence of November, 1958 and his failure to take the witness stand in June, 1953 and/or January, 1955 .....	8
(3) Did the effect of the prosecutor's questions on the defendant's credibility outweigh the prejudicial effect .....	11
(4) The statements of fact contained in the prosecutor's questions were offered by him testimonially and not for purposes of impeachment .....	11
(5) Decisions of state courts in similar situations .....	12

	Page
The Trial Court Erred in Failing to Sustain Objection to and Grant a Mistrial as to Certain Prejudicial Questions Asked of Doctor Williams on Cross-Examination by the Prosecutor .....	14
CONCLUSION .....	15
APPENDIX .....	17

## CITATIONS

## CASES:

<i>Abrams v. Gordon</i> , D.C. Cir., 276 F.2d 500 ....	14
<i>Armstrong v. State</i> , 136 Tex. Cr. 333, 125 S.W. 2d 578 .....	14
<i>Dolcin Corp. v. Federal Trade Commission</i> , D.C. Cir., 219 F.2d 742 .....	14
<i>Grunewald v. United States</i> , 353 U.S. 391 (1957) .....	7, 10, 11
<i>Loewenherz v. Merchants and Mechanics Bank of Columbus</i> , 144 Ga. 556, 87 S.E. 778 .....	13-14
<i>Parrott v. Commonwealth</i> , 20 Ky. Law Rep. 761, 47 S.W. 452 .....	14
<i>People v. Luckman</i> , 3 N.Y.S. 2d 864 .....	14
<i>People v. Russo</i> , 295 N.Y.S. 457, 251 App. Div. 176 .....	12
<i>Raffel v. United States</i> , 271 U.S. 494 (1926) .....	5, 7, 8, 10, 11, 13
<i>Reilly v. Pinkus</i> , 338 U.S. 269 .....	14
<i>State v. Bailey</i> , 54 Iowa 414, 6 N.W. 589 .....	14
<i>State v. Conway, et al.</i> (Sup. Ct. Mo.), 348 Mo. 587, 154 S.W. 2d 128 .....	13
<i>Smithson v. State</i> , 127 Tenn. 57, 155 S.W. 133 .....	14
<i>Stewart v. United States</i> , D.C. Cir., 214 F.2d 879 .....	3
<i>Stewart v. United States</i> , D.C. Cir., 247 F.2d 42 .....	3

## STATUTES:

18 U.S.C. Section 3481 .....	2, 12-13
28 U.S.C. Section 1254(1) .....	2
22 D.C. Code, 1951 ed. Section 2401 .....	2, 5
22 D.C. Code, 1951 ed. Section 2901 .....	2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 143

WILLIE LEE STEWART,

*Petitioner,*

*vs.*

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S BRIEF

I

Opinion Below

The opinion of the Court of Appeals<sup>1</sup> is reported at 275 F.2d 617, 107 U.S. App. D.C. 159, and appears in the record at pages 380 *et seq.* There was no opinion by the District Court.<sup>2</sup>

<sup>1</sup> The United States Court of Appeals for the District of Columbia Circuit is referred to herein as the "Court of Appeals."

<sup>2</sup> The United States District Court for the District of Columbia is referred to herein as the "District Court."

## II

### Jurisdiction

Jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under the provisions of 28 U.S.C. Sec. 1254 (1).

Judgment of the Court of Appeals was entered in this cause on February 16, 1960 (R. 399). Petition for rehearing *in banc* was denied on March 30, 1960 (R. 400). Petition for writ of certiorari was filed in this Court on April 29, 1960. On June 13, 1960 this Court granted the petition for writ of certiorari and leave to proceed *in forma pauperis* (R. 400).

## III

### Statutes Involved

The statutes involved, to wit, 18 U.S.C. Sec. 3481, Title 22, Sections 2401 and 2901 of the District of Columbia Code, 1951 edition are set forth as Appendix I to this brief. Also involved is the Fifth Amendment to the Constitution.

## IV

### Questions Presented

Where in a capital case petitioner has been tried twice before for the same crime **without taking** the witness stand, whether it **was error for the trial court** during the third trial to permit the prosecutor at the close of cross-examination of petitioner to ask twice, "This is the first time you have gone on the stand, isn't it, Willie?" where this question did not constitute proper impeachment of petitioner's credibility?

Did the trial court err in permitting cross-examination by the Government of petitioner's expert witness designed to show that the witness had studied under a certain teacher, and that the teacher believed that all persons who commit crimes are insane, where no foundation has been laid?

Did the trial court err in refusing to instruct the jury that it might find petitioner guilty of second degree murder if it found that petitioner did not have a "sound memory and discretion" and to fail to explain these terms to the jury?

## V

### Statement of the Case.

Petitioner was indicted on April 13, 1953 in the United States District Court for the District of Columbia. The indictment charged the crimes of first degree murder and robbery, arising out of the shooting of one Harry Honikman during a robbery of his store on March 12, 1953 (R. 16).

Petitioner was tried during June, 1953, and found guilty on both counts of the indictment, but judgment was reversed by the United States Court of Appeals for the District of Columbia. *Stewart v. United States*, 94 U.S. App., D.C. 293, 214 F.2d 879 (1954). A second conviction during January, 1955 following remand and a new trial was reversed by the same Court of Appeals, *en banc*. *Stewart v. United States*, 101 U.S. App., D.C. 51, 247 F.2d 42 (1957). A third trial in November, 1958 resulted in a conviction which was affirmed by the Court of Appeals, *en banc*, in a 5-4 decision (R. 380 *et seq.*). The mandatory death penalty has been imposed on petitioner (R. 33, 34).

During the course of the third trial, testimony of witnesses no longer available, was read into the record, first

by the United States (Tr. 12, 52) and later by petitioner, from the transcript of the first two trials. Petitioner did not testify at the first two trials (R. 392). At the third trial, petitioner testified in his own defense (R. 132-140). At the conclusion of the cross-examination of petitioner, he was asked the following questions by the prosecutor (R. 139, 140):

Q. Willie, you were tried on two other occasions.

A. Well, I don't care how many occasions, ~~now~~ many case—you say case. I was a case man once in a time.

Q. This is the first time you have gone on the stand, isn't it, Willie? A. What?

Q. This is the first time you have gone on the stand, isn't it, Willie? A. I am always the stand; I am everything, I done told you.

Mr. Smithson (the prosecutor): That's all.

An immediate motion for a mistrial was denied (R. 141). At the bench, during argument on the motion for a mistrial, the prosecutor gave the following and only attempted justification for this line of questioning (R. 140):

Mr. Smithson: I think that is a fact that the jury is entitled to know, Your Honor. On so many occasions they have referred to the record in the first case or the second case.

At no time did the prosecutor suggest that this questioning was for the purpose of impeachment of the petitioner's credibility.

Petitioner renewed his motion for a mistrial at the close of the evidence (R. 368) and again on a motion for a new trial (R. 32, 33). Both motions were denied (R. 368, 33). By a divided Court, the Court of Appeals affirmed the



conviction on the basis of *Raffel v. United States*, 271 U.S. 494 (1926) (R. 380 *et seq.*).

Dr. E. Y. Williams, a qualified psychiatrist, testified that in his opinion, petitioner was suffering from a mental disease, to wit, manic depressive psychosis, at the time that the crime was committed (R. 153).

Dr. Williams, during cross-examination by the prosecutor, was asked whether he was a follower or studied under one, Dr. Ben Karpman. The witness replied that he had studied under Dr. Karpman, but that he was not a follower of Dr. Karpman's school of psychiatry. Nevertheless, over objection (R. 169), the United States was permitted to ask Dr. Williams:

Q. Do you know, and don't you know as a fact, Doctor Karpman is one of those psychiatrists that subscribes to the view that every time a person commits a crime that that person is suffering under some mental disorder? A. Doctor Karpman has never so expressed that to me in my studies with him.

Q. Tell me, sir, do you subscribe to that view? A. No, sir. I have, each case that I see, I study and come to my own opinion.

Q. But you have testified in this Court, have you not, Doctor? A. Yes, sir.

Q. Have you not so testified that you have never examined a person in a criminal case and found that person of sound mind? A. No, sir; ... (R. 167).

Petitioner was convicted of violation of Title 22, D.C. Code (1951 ed.) sec. 2401, which provides in part:

Whoever, being of sound memory and discretion, kills another . . . in perpetrating or attempting to perpetrate . . . a robbery . . . is guilty of murder in the first degree.

The evidence established, by stipulation, that petitioner's Intelligence Quotient, on the combined Wechsler-Bellevue scale, was 65. Petitioner was discharged from the United States Army in 1945. The discharge report stated that petitioner was within the feeble-minded range and had a mental deficiency (R. 130).

Six witnesses testified as to the irrational behavior indulged in by the petitioner prior to March, 1953. Several of the witnesses testified that petitioner could not remember on the following day the irrational acts which he had committed (R. 45, 67, 68, 75).

Nevertheless, a requested instruction, that the jury might find petitioner guilty of second degree murder if they found that he did not have the requisite "sound memory and discretion" was denied (R. 28, 29). The trial court refused to explain the term "sound memory and discretion" or that this condition was an element of the crime (R. 29). (See Charge to Jury, R. 368, *et seq.*)

## VI

## ARGUMENT

**The Prosecutor Committed Prejudicial Error When Cross-Examining the Defendant by Stating Twice, "This Is the First Time You Have Gone on the Stand, Isn't It, Willie?"**

(1)

*What Was the Testimony That the Prosecutor Allegedly Sought to Impeach*

The legal propriety of the questions propounded by the prosecutor to the defendant, relating to whether or not he had taken the witness stand at previous trials, is largely controlled by the decisions of this Court in *Raffel v. United States*, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054 (1926), and *Grunewald v. United States*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed. 2d 931 (1957).

In *Raffel*, a prohibition agent testified at the first trial that after searching a drinking place Raffel admitted that the place belonged to him. Raffel did not testify. On a second trial, the agent gave similar testimony. Raffel then took the witness stand, and denied making the statements. *Raffel v. United States*, *supra*, at page 495. Raffel was then asked whether he had taken the stand previously, and following a negative response, why he had not done so. The Court held that if the questions asked of the defendant were logically relevant, and competent within the scope of the rules of cross-examination, then they were not forbidden by any policy in the law of evidence. *Raffel*, *supra*, at page 497.

In *Grunewald v. United States*, *supra*, at pages 419, 420, this Court emphasized the necessity for scrutiny by the

trial court to determine whether an inconsistency which is material and real, exists.

In the instant case, the Court of Appeals held that the direct testimony of the defendant was gibberish without meaning, exhibiting bizarre symptoms and abnormal behavior (R. 380, 381). The prosecutor in his argument to the jury conceded that the defendant's testimony amounted to nothing (Tr. 825, 826). The majority of the Court of Appeals held that the Defendant's testimony constituted only, demeanor evidence (R. 392). Thus the defendant made no material statement of fact, which might permit the prosecutor to interrogate him as to a prior inconsistent statement. The instant case, therefore, is quite different from *Raffel, supra*, where the defendant did make a material statement of fact.

The testimony which the prosecutor allegedly sought to impeach was the demeanor of the Defendant in November, 1958.

(2)

*Was There a Real, Material, Inconsistency Between Defendant's Demeanor Evidence of November, 1958 and His Failure to Take the Witness Stand in June, 1953 and/or January, 1955*

There are several substantial reasons why there is no real, material, inconsistency between the defendant's demeanor evidence of November, 1958 and his failure to take the witness stand in June, 1953 and/or January, 1955. First, according to the view of the Government and that of a majority of the Court of Appeals, the defendant would have had to take the witness stand in June, 1953 and January, 1955 and testified in a gibberish manner, in order that there be no inconsistency. This is medically unsound. The testimony of the psychiatrists described a manic-de-

pressive psychosis to involve a cycle, where the manifestation of the mental disease would change during that cycle. If the defendant were suffering from such a mental disease, as the defense psychiatrist testified, then he might well have been in the depressive stage of the cycle and could not have exhibited the gibberish which he did in November, 1958. On the other hand, it would be entirely consistent for the defendant to be suffering from a mental disease in November, 1958, and not have been suffering from the same disease at the time of the other trials. Again, it would not be inconsistent for the Defendant to be suffering from one malady in 1958 and a different one, exhibiting different symptoms, during the other trials. The Government's position and that of a majority of the Court of Appeals must of necessity be predicated upon a medical theory that the defendant had the same mental state from June, 1953 through November, 1958. Any deviation from that "same mental state" would destroy their theory of inconsistent behavior. Yet, the law is well acquainted with the proposition that the mental status of individuals can change quite rapidly. The law recognizes that insane persons may have lucid moments when they can validly execute a will or enter a contract. Even the criminal law recognizes that the mental health of an individual may change, by virtue of setting up different tests for criminal responsibility for the commission of a crime, and competency to stand trial.

Second, as the dissenting Judges of the Court of Appeals pointed out, the alleged inconsistency was not between the demeanor of the defendant on the witness stand in November, 1958 and his demeanor on the witness stand at either of the prior trials. It was simply a comparison between his taking the stand at the third trial and not taking it at either of the earlier trials.

Third, this Court in *Grunewald v. United States, supra*, held that the defendant's plea of the Fifth Amendment before the Grand Jury was not necessarily inconsistent with answering at trial the same questions. Although this Court relied on the particular facts involved in the case with respect to that Grand Jury, it is difficult to visualize any situation where it could be held that the response to certain questions was inconsistent with a previous taking of the Fifth Amendment plea to the same questions. This is based on the fact that innocent men can and do take the Fifth Amendment plea. It follows that innocent men may not take the witness stand at trial. They may do this for several reasons. For example, the defendant may have a criminal record for the same type of offense. In the instant case the defendant had a record. To hold otherwise, is to hold that all defendants who do not take the witness stand are *per se* guilty to some extent.

If this Court fails to re-examine *Raffel, supra*, then there is no reason why a prosecutor cannot impeach a defendant who takes the witness stand on the basis that he failed to testify at a hearing before the United States Commissioner or a committing magistrate. No logical distinction can be drawn between the failure to testify at a preliminary hearing and the failure to testify at a trial. In both cases the defendant is under no duty to speak. He has a constitutional and statutory right to remain silent.

A more proper test of inconsistency in similar situations would be did the defendant-witness remain silent when he was under a duty to speak. This would, of course, eliminate situations of failure to testify at preliminary hearings, inquests, and at trials, because in each case there is no duty to speak. Such a rule would also eliminate the need for re-examination of *Raffel, supra*, because *Raffel* recognized that the question must be competent, relevant, and within the proper scope of cross-examination.



## (3)

*Did the Effect of the Prosecutor's Questions on the Defendant's Credibility Outweigh the Prejudicial Effect*

The Court of Appeals held that although the issue of the defendant's sanity at the time of trial was not material, yet, if the defendant's testimony constituted fabrication of evidence, then the Government could properly rebut that evidence. This the Government attempted to do, through the testimony of two expert witnesses who testified that the defendant was malingering, and through the testimony of two lay witnesses. The Government rebutted the defendant's demeanor evidence. There was no need to impeach his credibility further by manifesting to the jury that the defendant in two prior trials had failed to take the witness stand. The prejudicial effect of these statements as contained in the two questions clearly outweighed the benefit of them to the Government's case, see *Grunewald v. United States*, *supra*, at pages 423, 424.

## (4)

*The Statements of Fact Contained in the Prosecutor's Questions Were Offered by Him Testimonially and Not for Purposes of Impeachment*

The majority of the Court of Appeals held that the questions propounded by the prosecutor were "... prefatory in nature ..." to an attempted impeachment. The majority of the Court recognized that the questions could not be error, only if this were an attack on credibility, and thus within the doctrine of *Raffel*, *supra*.

Following the propounding of the questions, and the motions for Mistrial by the Defendant, counsel approached the bench. The prosecutor when questioned concerning

what he had done, stated, "I think that is a fact that the Jury is entitled to know, Your Honor" (R. 140). At no time during the conference at the bench or thereafter during the trial did the prosecutor indicate, that the questions propounded to the Defendant on the witness stand with respect to the fact that this was the first time that he had taken the stand, were for impeachment purposes. To the contrary, he specifically stated that he was offering the information to the jury as proof of the fact, that is, testimonially.

Further, the prosecutor made no attempt to complete the impeachment, if it was in fact an attempt at impeachment. The defendant's lack of answers did not foreclose the prosecutor from completing the impeachment by use of extrinsic evidence.

Nor did counsel for the Government dispute in oral argument before the Court of Appeals that the questions propounded by the prosecutor were a parting and final shot given as the prosecutor resumed his seat at the close of the cross-examination.

Based upon these reasons it is respectfully submitted that the questions propounded by the prosecutor were not prefatory in nature to the process of impeachment.

(5)

#### *Decisions of State Courts in Similar Situations*

In *People v. Russo*, 295 N.Y.S. 457, 251 App. Div. 176 (1937), the defendant had remained mute before the Magistrates' Court, but testified at trial. The Court inquired of him whether he had testified at the Magistrates' Court, and whether at that time he had made any explanation of why he was running when arrested. Section 393 of the Code of Criminal Procedure (New York) is similar to 18 U.S.C.

Sec. 3481. It removes the common law disability of being a witness, but states that the defendant's neglect or refusal to testify shall not create any presumption against him. The People argued, as in *Raffel v. United States*, *supra*, that by taking the stand at trial, the defendant waived his rights under Section 393 of the Code of Criminal Procedure. The Court held that the inquiry constituted clear error because the defendant had a right to stand mute in the Magistrates' Court.

In *State v. Conway et al.* (Sup. Ct. Mo.), 348 Mo. 587, 154 S.W. 2d 128 (1941) the trial court had permitted the prosecuting attorney to cross-examine one of the defendants with respect to the fact that she had not taken the stand at a preliminary hearing. The Court had occasion to discuss at length the decision in *Raffel v. United States*, *supra*. In holding that the defendants did not waive their rights completely by taking the witness stand at trial, that is, they did not waive the privilege claimed at the preliminary hearing, the Court reasoned as follows. First, the privilege guaranteed by the Constitution is unambiguous, as was the statute which prevented comment thereon. Second, no suspicion or incrimination should follow the assertion of a constitutionally given right. Third, it is just as logical to say that a qualification of the privilege does operate to bring pressure on the accused to testify in the first instance, as it is to contend the opposite. Fourth, this provision of the Constitution should not be interpreted as if it were designed to protect the guilty, nor should it be presumed that one who avails himself of it is hiding his guilt.

Other cases holding it to be prejudicial error to cross-examine a defendant with respect to the fact of whether he took the witness stand at a prior trial, hearing or inquest are, *Loewenherz v. Merchants and Mechanics Bank*

of Columbus, 144 Ga. 556, 87 S.E. 778; *State v. Bailey*, 54 Iowa 414, 6 N.W. 589; *Parrott v. Commonwealth*, 20 Ky. Law Rep. 761, 47 S.W. 452; *People v. Luckman*, 3 N.Y.S. 2d 864; *Smithson v. State*, 127 Tenn. 57, 155 S.W. 133; *Armstrong v. State*, 136 Tex. Cr. 333, 125 S.W. 2d 578.

**The Trial Court Erred in Failing to Sustain Objection to and Grant a Mistrial as to Certain Prejudicial Questions Asked of Doctor Williams on Cross-Examination by the Prosecutor.**

During the cross-examination of the defense psychiatrist, Doctor Williams, the prosecutor established that the witness had studied under a Doctor Karpman. He then asked the Doctor if it wasn't a fact that Doctor Karpman subscribed to the view that all criminals are suffering from a mental disorder. Despite the witness' protestation that he knew of no such fact, the prosecutor then established that the witness had testified in Court on previous occasions. The prosecutor then asked the witness, "Q. Have you not so testified that you have never examined a person in a criminal case and found that person of sound mind?" The witness replied in the negative (R. 167).

This constituted improper cross-examination, as no foundation was laid. The views of Doctor Karpman were not shown to be authoritative. *Reilly v. Pinkus*, 338 U.S. 269; *Dolcin Corp. v. Federal Trade Commission*, D.C. Cir., 219 F.2d 742, 746, 747; *Abrams v. Gordon*, D.C. Cir., 276 F.2d 500.

**Conclusion**

Petitioner respectfully submits that the judgment of the Court of Appeals should be reversed and the cause remanded for a new trial.

Respectfully submitted,

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## APPENDIX

### I

#### STATUTES INVOLVED

Act of March 3, 1901, 31 Stat. 1321, c. 854; Section 798 as amended, Title 22, Section 2401, of the District of Columbia Code, 1951 edition, provides:

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do, kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402 of this Code, rape, mayhem, robbery, or kidnapping, or in perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

Act of March 3, 1901, 31 Stat. 1322, c. 854, Section 810, Title 22, Section 2901 of the District of Columbia Code, 1951 edition, provides:

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Act of June 25, 1948, c. 645, 62 Stat. 833, 18 U.S.C. Section 3481 provides:

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.



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Office-Supreme Court, U.S.

FILED

JAN 12 1961

JAMES B. BROWNING, Clerk

No. 143

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**In the Supreme Court of the United States**

OCTOBER TERM, 1960

WILLIE LEE STEWART, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF FOR THE UNITED STATES**

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# INDEX

	Page
Opinions below .....	1
Jurisdiction .....	1
Questions presented .....	2
Statement .....	2
A. The facts of the crime .....	4
B. The defense of insanity .....	5
C. Petitioner's cross-examination .....	8
Summary of argument .....	11
Argument .....	16
I. Asking petitioner whether this was the first time he had taken the stand was not prejudicial and did not require a mistrial .....	16
A. Introduction .....	16
B. The question was relevant and competent as one of a series of memory-testing questions but was of no importance for that purpose .....	19
C. The question could have had no substantial effect upon the jury, permissible or otherwise .....	23
D. The risk of prejudice, if any, could have been avoided by appropriate instruc- tions and a mistrial was not required ..	29
E. There is no occasion in this case to recon- sider <i>Raffel v. United States</i> .....	36
II. The cross-examination of the defense psychiatrist (E. Y. Williams) as to the views of a profes- sional colleague under whom Dr. Williams testified he had received training, and whether he shared those views, was not prejudicial error.	
Conclusion .....	42

## CITATIONS

## Cases:

<i>Baker v. United States</i> , 115 F. 2d 533, certiorari denied, 312 U.S. 692	Page 33
<i>Becher v. United States</i> , 5 F. 2d 45, certiorari denied, 267 U.S. 602	25
<i>Berger v. United States</i> , 295 U.S. 78	33
<i>Chadwick v. United States</i> , 117 F. 2d 902, certiorari denied, 313 U.S. 585	25
<i>Delli Paoli v. United States</i> , 352 U.S. 232	33
<i>Dunlop v. United States</i> , 165 U.S. 486	33
<i>Durham v. United States</i> , 214 F. 2d 862	41
<i>Fisher v. United States</i> , 328 U.S. 463	41, 42
<i>Grunewald v. United States</i> , 353 U.S. 391	16, 17, 21, 29, 38
<i>Hill v. United States</i> , 22 App. D.C. 395	42
<i>Hopt v. Utah</i> , 120 U.S. 430	33
<i>Johnson v. United States</i> , 318 U.S. 189	34
<i>Knowles v. United States</i> , 224 F. 2d 168	33
<i>Lau v. United States</i> , 13 F. 2d 975, certiorari denied, 273 U.S. 739	33
<i>Milton v. United States</i> , 110 F. 2d 556	33
<i>Morgan v. United States</i> , 31 F. 2d 385, certiorari denied, 280 U.S. 556	33
<i>Nolen v. United States</i> , 190 F. 2d 418	33
<i>Raffel v. United States</i> , 271 U.S. 494	19, 29, 37, 39
<i>Reilly v. Pinkus</i> , 338 U.S. 269	40
<i>Robilio v. United States</i> , 291 Fed. 975, certiorari denied, 263 U.S. 710	33
<i>Smith v. United States</i> , 112 F. 2d 217, certiorari denied, 311 U.S. 633	25
<i>Spivey v. United States</i> , 100 F. 2d 181, certiorari denied, 310 U.S. 631	33
<i>Turner v. American Security &amp; Trust Co.</i> , 213 U.S. 257	33
<i>United States v. Antonelli Firearms Co.</i> , 155 F. 2d 631, certiorari denied, 339 U.S. 742	33
<i>United States v. Di Carlo</i> , 64 F. 2d 15	33
<i>United States v. Ginsburg</i> , 96 F. 2d 882, certiorari denied, 305 U.S. 620	33
<i>United States v. Nimerick</i> , 118 F. 2d 464, certiorari denied, 313 U.S. 592	33

### III

#### Cases—Continued

Page

*Waldron v. Waldron*, 156 U.S. 361 ..... 33

*Young v. United States*, 168 F. 2d 242, certiorari denied, 334 U.S. 859 ..... 33

#### Statutes:

D.C. Code 22-2401 ..... 42

#### Miscellaneous:

Karpman, *Criminality, Insanity and the Law*, 39 J. Crim. L. & Crimin. 584 (1949) ..... 41

Karpman, *Criminal Psychodynamics*, 47 J. Crim. & Crimin. 8 (1956) ..... 41

Krash & Levine, *Memorandum of Dissent*, 26 Journ. Bar Assoc. of D. C. 316 (1959) ..... 42

2 Underhill, *Criminal Evidence* (5th ed. 1956), p. 790 ..... 40

Wechsler, *The Criteria of Criminal Responsibility*, 22 U. of Chi. L. Rev. 367 (1955) ..... 42

2 Wharton, *Criminal Evidence* (12th ed. 1955), p. 354 ..... 40

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## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The majority (R. 380-394)<sup>1</sup> and dissenting opinions (R. 394-399) of the court of appeals, sitting *en banc*, are reported at 275 F. 2d 617, 626.

<sup>1</sup>“R.” refers to the record printed for the use of this Court. Counsel have stipulated that the portions of the original record not printed might nevertheless be referred to in the brief and arguments in this Court. This original record, on file with the Clerk, includes: the transcript of the present trial (November 1958), which will be referred to as “Tr.”; the transcript of petitioner’s first trial in June 1953; the transcript of the second trial in January 1955; the transcript of petitioner’s competency hearing in October 1958; a volume titled “Joint-Appendix”; and an “Original Record on Appeal” containing pleadings and other documents relating to all three trials.

**JURISDICTION**

The judgment of the court of appeals was entered on February 16, 1960 (R. 399). A petition for rehearing was denied on March 30, 1960 (R. 400). The petition for a writ of certiorari was filed on April 25, 1960 and granted on June 13, 1960 (R. 400; 363 U.S. 818). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

**QUESTIONS PRESENTED**

1. Whether, in the unique circumstances of this case, prejudice of a character requiring a mistrial resulted when the defendant, testifying in his third trial, was asked by the prosecuting attorney whether he had testified at his prior trials, the question never being answered and the failure to testify at the prior trials not otherwise being alluded to during the course of the trial.

2. Whether there was improper cross-examination of a defense psychiatrist.

3. Petitioner also raises but does not argue the following question: Whether evidence of his low intelligence quotient required an instruction to the jury that he could be found guilty of second degree murder.

**STATEMENT**

On April 13, 1953, an indictment was returned in the United States District Court for the District of Columbia, charging petitioner with the murder, on March 12, 1953, of one Harry Honikman in the commission of a robbery (R. 16), and, in a second count, with robbery (R. 16). The present proceeding stems



from petitioner's third conviction on both counts (R. 27, 378-379).<sup>2</sup> By a 5-4 decision, the court of appeals, sitting *en banc*, affirmed the conviction (R. 399), the dissenting judges expressing the view that it was reversible error for the prosecutor to ask petitioner on cross-examination a question about not having taken the stand at a prior trial (R. 394-399). Petitioner's mandatory sentence was the death penalty (R. 33-34).

The principal issue argued by petitioner relates to the propriety of his cross-examination.<sup>3</sup> He also states as a question presented (included also in the petition), but does not argue, the refusal of the trial judge to instruct the jury that it could convict petitioner of second degree murder because of his low intelligence quotient. Petitioner does not here question the sufficiency of the evidence supporting the jury verdict that he committed the offense and was sane at that time, a determination fully reviewed by the majority of the court below (R. 380-394). However, the questions raised must be judged in the light of the whole record. We therefore outline the facts of the crime, the evidence on insanity, and, finally, the

<sup>2</sup> Following each of two previous convictions (in 1953 and 1955) on these charges, the court of appeals reversed for reasons bearing on the defense of insanity—on the first appeal (214 F. 2d 879), because of an error in the instructions on insanity, and on the second appeal (247 F. 2d 42), because of error in the closing argument of the prosecutor as to the credibility of petitioner's lay witnesses.

<sup>3</sup> Petitioner also argues error in the cross-examination of the defense psychiatrist; the facts bearing on that issue are set forth in the Argument on that point. *Infra*, pp. 39-40.

pertinent proceedings on the cross-examination of petitioner.

#### A. THE FACTS OF THE CRIME

The evidence establishing that petitioner killed one Harry Honikman during the perpetration of a robbery was unchallenged, either at the third trial or at the two prior trials.<sup>4</sup> The facts show that, on the evening of March 12, 1953, shortly before closing time, petitioner entered a grocery store in Washington, D.C., owned by one Harry Honikman, and purchased a bottled soft drink and a bag of potato chips, later throwing the bag in the wastebasket. Shortly thereafter, petitioner ordered another bottle of soda. Mr. Honikman advised him it was closing time (about 9:00 p.m.), and asked if he would mind taking the soda with him. As Mr. Honikman came from behind the counter to give petitioner his purchase, petitioner drew a pistol and said, "Okay, this is it" (Tr. 25). He then demanded the contents of the cash register, and shot Mr. Honikman, who died instantly. Petitioner thereupon removed some \$416 from the cash register, and left.

Mr. Honikman's wife and daughter, who were in the store when petitioner first entered, witnessed the

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<sup>4</sup> On the first appeal, writing for a unanimous court of appeals, Judge Bazelon stated: "There is not the slightest doubt from the evidence . . . that [petitioner] committed the offense," 214 F. 2d at 880. Again, in his opinion on the second appeal, Judge Bazelon observed: "In both trials the evidence made it unmistakable that, if the appellant was legally sane, he was guilty of the homicide charged against him." 247 F. 2d 42, 43. The evidence adduced in the third trial is summarized in the majority opinion below at R. 380-381.

entire transaction including the shooting, and later selected petitioner out of a police line-up as the slayer.<sup>5</sup> In addition, expert testimony was adduced revealing that petitioner's fingerprints were contained on a potato chip bag and an empty soda bottle found in the grocery shortly after the killing (Tr. 87-95, 98-108), and that his revolver was the murder weapon (Tr. 184-194).

#### B. THE DEFENSE OF INSANITY

At this, as at the prior trials, petitioner posited his defense on the claim that he was insane at the time of the homicide. This defense had a three-fold aspect.

1. First, the defense introduced lay testimony—of relatives and friends—concerning petitioner's conduct and behavior over a period of years preceding the homicide.<sup>6</sup> The essence of this testimony was that petitioner had committed many bizarre and inexplicable acts over the years preceding the crime indicative of mental derangement (see, for example, testimony<sup>7</sup> of petitioner's wife, Annie Lee Stewart (R. 87-99)).<sup>7</sup>

<sup>5</sup> The testimony of deceased's daughter, Edith Honikman Burka, is set forth at Tr. 20-51. The testimony of his wife, Betsy Honikman, given at the first trial, was read into the record (Tr. 53-56).

<sup>6</sup> The lay witnesses included, *inter alia*, petitioner's cousin (Irene Anderson, R. 35-43); his sister-in-law (Julia Daniels, R. 44-56); an Army acquaintance (Yancy Peterson, R. 58-62); his sister (Geneva Mason, R. 62-73); his employer (James Erby, R. 73-80), and his wife (Annie Lee Stewart, R. 87-109).

<sup>7</sup> Other testimony recounting such prior conduct is set forth at R. 37-38, 41-42, 45-46, 58-62, 73-80, 111-114, 116-119. The government introduced rebuttal lay testimony of one James Hamilton who testified that he had known petitioner for six

2. Second, portions of petitioner's Army record were read to the jury (R. 129-131).<sup>\*</sup> This report stated that petitioner had scored a 63 on the verbal sub-test, 76 on the performance sub-test, and 65 on the combined scale of the Wechsler-Bellevue Intelligence examination and that this "would indicate intelligence falling within the feeble-minded range," although there was no "evidence of ~~neurosis~~ or psychosis" (R. 130). The report concluded that petitioner was "Illiterate but mentally adequate" (R. 131). Dr. Ernest Y. Williams, the defense psychiatrist, stated that an I.Q. of 65 reflected an intelligence within the moronic range, a condition not capable of cure (R. 152, 162).

In rebuttal, two government psychiatrists, Drs. Elmer Klein and Morris Kleinerman testified that, while petitioner was of low average intelligence, he was not a mental defective (*Dr. Klein*: R. 199-200, 202-203, 213-215; *Dr. Kleinerman*: R. 226-227, 231-232, 261-262, 266-267). As Dr. Kleinerman put it, the verbal sub-test of 63 would be "affected by [petitioner's] educational achievements," while the performance sub-test rating of 76 reflected "[n]ative endowment, and this is more nearly his potential than the other years prior to the homicide and that, from 1950-1953, he had seen petitioner about "once or twice a week," and believed him to be of sound mind on March 12, 1953, the date of the homicide (R. 274-278).

<sup>\*</sup> Petitioner was drafted in 1943 and, after his honorable discharge in 1945, he reenlisted. In 1946 he was discharged (R. 129). By stipulation of counsel this record was not offered in evidence.

which depends greatly on his educational achievements" (R. 231).<sup>2</sup>

Defense counsel's request that the trial judge instruct the jury that, from the evidence of petitioner's low intelligence it might find him guilty of murder in the second degree, was denied (see Requests for Instructions Nos. 4 and 6, pp. 29-31).

3. Lastly, Dr. Williams testified that he had examined petitioner some three months after the homicide—in late June 1953—for two hours and that, from this examination, he was unable to determine if petitioner was insane on the date of the crime (R. 144, 165, 170). However, when asked to assume the truth of the lay testimony adduced in petitioner's favor (*supra*, p. 5), and the validity of petitioner's Wechsler-Bellevue rating, and to consider these additional elements in addition to his personal diagnosis, Dr. Williams stated his belief that on March 12, 1953, petitioner was suffering from both a mental disease and mental defect (R. 145-151, 153, 157-158, 175, 180-182).

On the other hand, Drs. Klein and Kleinerman, who had each examined petitioner some two weeks after the offense (Dr. Klein on March 26, 1953, for about an hour; Dr. Kleinerman for two hours on March 25, 1953), agreed that petitioner was not suffering from a mental disease or defect on the date of the homicide

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<sup>2</sup> Similarly, see the testimony of Dr. William G. Cushard, a psychiatrist at St. Elizabeth's hospital who had examined petitioner on January 2, February 3, and April 14, 1958 (R. 343-344, 352; see also testimony of Dr. Mary V. McIndoo, a psychiatrist on the staff at D.C. General Hospital (R. 361-362)).

(*Dr. Klein*: R. 195-197, 199-202; *Dr. Kleinerman*: R. 228-229, 231-232, 261-262).

### C. PETITIONER'S CROSS-EXAMINATION

Petitioner, who had not testified on the first two trials, took the stand at the third trial and gave testimony which the court below described as "gibberish without meaning" (R. 381), revealing that "he was suffering from a grave mental disease or defect \* \* \* or he was malingering—staging a show of mental aberration to influence the judge and jury" (R. 381-382). When his counsel asked him at the outset whether he would swear to tell the truth, he answered, "I don't know" (R. 132). In denying he was married, he stated that "nobody is married" (R. 133). When asked if he knew that his attorney's name was Mr. Carey, he responded: "You asked—you know what your name is. Don't ask me. I ain't asked what your name is, is I? You go ask yourself" (R. 134). He testified that he was going to kill until he conquered; that he would be the master; and that he had spoken many times with God who had told him to conquer all the peoples of the world (R. 134-136). He further said that he never heard the name Harry Honikman; that he did not kill Mr. Honikman; that he had killed "nobody yet"; and that as far as he was concerned he was charged with nothing (R. 134). When inquiry was made as to whether he had ever been tried for first degree murder before this time, petitioner replied, "I ain't never been tried. I ain't never been tried". (R. 135).



On cross-examination, petitioner continued this same appearance of irrationality and faulty memory. He did not recall, *inter alia*, being examined by any of the psychiatrists, or being in the Army, or where he was living, or whether he was arrested and for what (R. 137-139). The following colloquy then occurred (R. 139-140):

Q. Willie, you were tried on two other occasions.

A. Well, I don't care how many occasions, how many case—you say case. I was a case man once in a time.

Q. This is the first time you have gone on the stand, isn't it, Willie?

A. What?

Q. This is the first time you have gone on the stand, isn't it, Willie?

A. I am always the stand, I am everything, I done told you.

Mr. SMITHSON [prosecuting attorney]. That is all.

The WITNESS. You and nobody else going ever to stop me.

The COURT. Mr. Carey, anything further?

Mr. CAREY. That is all.

After the witness was excused, defense counsel, out of the hearing of the jury, moved for a mistrial on the basis of the prosecutor's question as to petitioner's taking the stand for the first time. This further colloquy then ensued (R. 140-141):

The COURT. That wasn't mentioned, was it?

Mr. CAREY. He mentioned it, Mr. Smithson. Read it. I would like to have you read it.

The COURT. The conviction?

Mr. CAREY. No, taking the stand. This is the first time you have taken the stand, Willie, isn't it.

Mr. SMITHSON. I think that is a fact that the Jury is entitled to know, Your Honor. On so many occasions they have referred to the record in the first case or the second case.<sup>10</sup>

MR. CAREY. I think it is highly prejudicial. I would like to have it read.

Would you read that comment of the prosecutor?

(Whereupon the indicated question was read by the reporter.)

The COURT. Motion denied.

Petitioner renewed the motion for a mistrial at the close of the evidence (R. 368) and assigned the denial of the motion as error in his motion for a new trial (see p. 32 of Joint-Appendix on file with the Clerk of this Court).

Thereafter, to rebut petitioner's appearance of irrationality, testimony was adduced by the government from lay and psychiatric witnesses that petitioner was sane and competent at the time of trial. The psychiatrists testified that petitioner was malingering (see R. 282-287, 288-328, 338-339, 343-348, 356, 359-360, 386-387).<sup>11</sup>

<sup>10</sup> Petitioner's counsel had previously informed the jury that petitioner had been tried before by reading excerpts from testimony adduced at the former trials (R. 35; see also Tr. 47).

<sup>11</sup> Similarly, at the pretrial competency hearing held on October 28-29, 1958, Dr. Mary V. McIndoo testified that she had examined petitioner and believed him competent to stand trial (see Transcript of Competency Hearing on File with the Clerk of this Court, pp. 111-115). Following this hearing, on October 30, 1958, the district judge (Letts, J.) issued an order

## SUMMARY OF ARGUMENT

## I

During the cross-examination of petitioner, government counsel asked, and received an incoherent reply to, the following question: "This is the first time you have gone on the stand, isn't it, Willie?" No other mention was made of petitioner's failure to testify at his two prior trials during the course of the present trial, in the closing arguments, or in the charge to the jury. The principal question in this case is whether the asking of that question required a mistrial to be declared.

We agree with petitioner that the question should not have been asked if it did in fact have a prejudicial effect, for its probative value for the only purpose for which it was logically relevant—simply as one of a series of questions to test petitioner's comprehension and memory—was hardly sufficient to warrant incurring a risk of prejudice. Thus the only issue in dispute is whether the asking of the question did, as petitioner assumes, have a prejudicial effect. In our view, there was in fact no substantial likelihood that the jury would draw from the question an inference adverse to petitioner and that whatever likelihood of prejudice there was, if any, could have been forestalled by an admonition to the jury that leading questions are not evidence of the facts assumed, and a mistrial was not required.

finding petitioner of sound mind, able to understand the nature of the proceedings against him, and to assist in his own defense. The court found him to be a malingerer (R. 26-27).

In the ordinary case in which the issue is whether the defendant committed the acts charged, the danger that the jury will infer from a defendant's failure to testify that he did commit the acts is an evident one. Petitioner assumes that because such a danger is present in most cases it can be accepted without examination that there was a similar danger here. We submit, however, that, in the unique circumstances of this case, there was not only little likelihood that the jury was even aware that petitioner had not previously testified but there was no way in which that fact, even if brought to the jury's attention, could have been prejudicial to petitioner.

In the first place, since the question remained unanswered, the jury was in fact never told of petitioner's prior silence, and in view of the context in which the question was asked and the little emphasis given to it, it seems unlikely that the question made any more impression upon the jury than upon the judge, who was not even aware of its being asked. Nor was the matter ever again alluded to or the jury invited, implicitly or explicitly, to draw any adverse inferences from it.

More importantly, there was no way in which the jury could have made use of the fact of petitioner's prior silence, even if established, to resolve any of the issues in this case. On the question whether petitioner had committed the acts charged, no attempt was made to deny that fact at the third trial itself, and the failure previously to deny it could add nothing to the failure to do so then. Nor could the jury draw any inference from the prior

silence in determining whether petitioner was malingering in his "testimony" at the third trial—i.e., in his implied representation that he was then incompetent—for, if petitioner were as irrational as he purported to be, he obviously lacked the capacity to make a rational judgment whether or not to testify in his previous trials.

The "prejudicial effect" of which petitioner complains must, therefore, be in the danger that the jury inferred from his prior silence that he was sane at the time of the offense. Petitioner does not attempt, however, to explain how such an inference might be drawn, and in our view there was no way in which it could be. The reasoning that if petitioner had been insane he would have testified concerning his condition at the time of offense is precluded by his appearance on the stand as being incompetent at the time of the trial. If the jury believed that appearance, it would fully explain his failure to testify previously. If they believed he was feigning, on the other hand, his failure to testify at the prior trials could add nothing to his refusal to give meaningful testimony at the third trial and his attempt, instead, affirmatively to deceive the jury.

The question here, moreover, is not simply whether the question was improper in the sense that an objection to it should have been sustained, or whether there was some remote possibility of prejudice, but whether the possibility of prejudice was so great that it could not be avoided by any means short of a mistrial. The trial court did not, in this case, rule

that the question was a proper one or refuse to admonish the jury to ignore it. All that occurred was that the question was asked, an unresponsive answer was received, and petitioner's motion for a mistrial was denied. Not having requested other curative relief—such as an admonition to the jury to ignore the question—petitioner must stand here on his claim that nothing less than a mistrial was adequate. Nor is there any reason to believe that the failure of counsel to ask for curative instructions was inadvertent rather than deliberate. In the context in which the question was asked, as we have noted, it was given so little emphasis that not even the trial judge took note of it, and defense counsel could quite reasonably have concluded that not only was an admonition unnecessary but it would only serve to emphasize to the jury an incident that they had very likely otherwise overlooked.

When the defendant has been represented by competent counsel who has chosen, for good reasons, not to seek curative instructions, a mistrial ought not be required even in a capital case, we submit, without at least some showing not only that there was something more than a remote possibility of prejudice, but that other measures, short of a mistrial, were inadequate to forestall that possibility. As we have shown, the claim of prejudice here depends upon a series of propositions some of which are at best speculative and others of which are simply unsupportable: (1) that the jury took note of a question so little emphasized that not even the trial judge was aware of it; (2) that, although the question was never



answered, the jury inferred from the question the fact that petitioner had not previously testified; and (3) that the jury then inferred from petitioner's prior silence, by a process of reasoning still to be explained, that petitioner was sane at the time of the offense. And as to the efficacy of curative instructions to foreclose the possibility of prejudice (if any), this Court is apparently asked simply to assume that a jury will not follow even so simple and direct an admonition as one telling it to ignore a single irrelevant and unanswered question. In short, petitioner has, we submit, failed to show either a possibility of prejudice or the inadequacy of a simple instruction to the jury to overcome whatever possibility of prejudice there may have been.

## II.

There is no merit to petitioner's claim of prejudicial error in the cross-examination of Dr. E. Y. Williams, the defense expert in psychiatry. In light of the testimony adduced on direct examination of Dr. Williams and as a matter of valid impeachment, it was proper to ask him whether he agreed with the published views of a colleague (Dr. Benjamin Karpman) under whom he had received training. In any event, as the court below pointed out, the question was totally harmless since it produced "nothing except a positive disavowal by the witness of the viewpoint attributed to Dr. Karpman." (R. 389).

## ARGUMENT

## I

ASKING PETITIONER WHETHER THIS WAS THE FIRST TIME HE HAD TAKEN THE STAND WAS NOT PREJUDICIAL AND DID NOT REQUIRE A MISTRIAL

## A. INTRODUCTION

During the course of the cross-examination of petitioner, government counsel asked, and received an incoherent reply to, the following question: "This is the first time you have gone on the stand, isn't it, Willie?" The incident occurred on the second day of a trial that lasted five days, and the matter was not again alluded to, in the presence of the jury, during the rest of the trial, in the closing arguments, or in the charge to the jury. Immediately after the incident, petitioner moved for a mistrial, which the court denied without comment. The primary question in this case is whether, because of the asking of that single unanswered question,<sup>12</sup> the motion for a mistrial should have been granted.

In approaching that problem we start on common ground with petitioner as to the meaning of *Grunewald v. United States*, 353 U.S. 391. In that case, a defendant in a conspiracy trial (Halperin), having given innocent answers to questions concerning his relationship with the alleged co-conspirators, was

<sup>12</sup> Petitioner seems to draw some comfort from the fact that petitioner first replied "What?" and counsel then repeated the question, so that, as petitioner says, the question was "twice" asked (Pet. Br. 2, 7). While we do not mean to deny that fact, it seems to us that a question repeated because not heard or understood is more meaningfully described as one question rather than two, and it is for that reason that we refer in this brief to the "single" question.

required on cross-examination to admit that he had pleaded the Fifth Amendment to the same questions before a grand jury. The jury was then instructed that it might consider that evidence as bearing on the defendant's credibility. Noting that there was in fact no inconsistency between the defendant's refusal to answer questions before the grand jury and his testimony at the trial, this Court held that the evidence of his prior invocation of the privilege was of less than negligible value in impeaching the defendant's testimony and should therefore have been excluded—under the traditional standards of materiality—because of the evident danger that the jury would make impermissible use of it by equating a claim of the privilege with guilt. As stated by the Court (p. 424):

\* \* \* in this case the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used. If the jury here followed the judge's instructions, namely, that the plea of the Fifth Amendment was relevant only to credibility, then the weight to be given this evidence was less than negligible, since \* \* \* there was no true inconsistency involved \* \* \*. On the other hand, the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible.

In substance, therefore, *Gruncwald* was simply a particularized application of the accepted rule of evidence that otherwise relevant and competent evidence

may nevertheless be excluded if its probative value, properly used, is slight and the danger of its improper use is great.

On that principle, we are in agreement with petitioner. Our disagreement arises only over its application to the unique circumstances of this case. Petitioner simply assumes that the question asked here had a "prejudicial effect" and then argues that the value of the inquiry to the government was insufficient to outweigh that likelihood of prejudice. We, however, concede what petitioner argues and challenge only what petitioner assumes. That is, while we think the inquiry was a relevant and competent one, we concede that it was of but negligible importance to the government's case, and argue only that it was equally unprejudicial to petitioner. In short, we are in agreement with petitioner on the negligible value of the inquiry to the government, and the only disagreement—and the only question to be resolved by this Court—is whether the asking of the question was in fact prejudicial to petitioner. If it was not in fact prejudicial, the question, otherwise competent and relevant, was a proper one and, for that matter, even if it were not, there would be no basis for declaring a mistrial. If it was prejudicial, on the other hand, we concede that the question should not have been asked, and the only issue then becomes whether the prejudicial effect could have been avoided by an appropriate admonition to the jury or whether the prejudice was so great that a mistrial was required.

We will first show for what purpose we consider the question asked to have been relevant and competent

and why it was of but negligible importance to the government for that purpose. We will then show that the question could have had no impact upon the jury for any other purpose, permissible or impermissible. Next we will show that, even if it did, the prejudicial effect could hardly have been so great that it could not have been cured by some measure (admonitions to the jury) short of declaring a mistrial. We will note, finally, why this case provides no occasion for a re-examination of *Raffel v. United States*, 271 U.S. 494, as suggested by petitioner.

R. THE QUESTION WAS RELEVANT AND COMPETENT AS ONE OF A SERIES OF MEMORY-TESTING QUESTIONS BUT WAS OF NO IMPORTANCE FOR THAT PURPOSE.

Although it has little effect on the outcome of the case, it is appropriate to state explicitly what we consider to have been the only proper purpose for which the question asked was relevant—namely: to test petitioner's memory and comprehension in an attempt to reveal as malingering his seemingly irrational behavior on the stand. The relevance of the question for that purpose is, we think, evident from the context in which it was asked.

Petitioner's testimony (which appears in full at R. 132-140) was, on both direct and cross-examination, almost entirely irrational and unresponsive, amounting to, as the court of appeals said, "gibberish without meaning" (R. 381). Its verbal content being of no significance, the only relevance of the testimony as a whole lay in its implied representation that petitioner was then (at the time of the trial) totally incompetent. It was the government's belief,

supported by psychiatric and lay testimony, that petitioner was malingering in an effort to influence the jury to find that he was insane at the time of the crime.<sup>13</sup> The only issue to which the cross-examination could be directed, therefore, was whether or not petitioner was malingering—*i.e.*, whether his implied "testimony" that he was incompetent was "credible."

Like the direct examination, the cross-examination was necessarily limited, by the nature of petitioner's responses, to the asking of simple questions relating to petitioner's personal history, his family, the charges against him, the prior proceedings, and recent events—all having no purpose but to test out petitioner's memory and comprehension. It was apparently the hope of the prosecutor that, in responding to a series of simple memory-testing questions, petitioner might in some way—perhaps by dropping his guard and responding rationally or, perhaps, by "overplaying" his pose of knowing nothing of his own circumstances—tip his hand and give the jury a clue that he was malingering.

It was as the last of the series of such questions—none of which related to any fact material to the

<sup>13</sup> The government's view that petitioner was feigning was based on expert testimony adduced at the pretrial competency hearing, as well as from a psychiatrist who testified that petitioner had been under observation for some time up until the date of trial and that these observations indicated that he was not suffering from mental illness but was a malingerer (see the Statement, *supra*, p. 10, n. 11). The government had corroborating information from lay witnesses and psychiatrists who had had the opportunity to observe petitioner regularly over a period of some years up to the date of the third trial. All of this evidence was introduced by the government on rebuttal (R. 282-287, 288-325, 338-350, 356-361).



case (e.g., where petitioner had gone to school, whether he was in the Army, what work he did, if he remembered being arrested)—that the question challenged here was asked. In that context, its relevance, like that of the series of which it was a part, did not depend upon the *fact* inquired about (whether he had previously testified) but upon petitioner's capacity to *remember* the fact and respond rationally to the question. In one respect, indeed, that question may have been ~~substantially~~ somewhat more relevant than the others asked, since petitioner had stated on direct examination that he had "never been tried" (R. 135), and an admission by him that he remembered not having taken the stand at his prior trials would have tended to show that his purported failure to remember being tried was a sham. Quite apart from that, however, the question was at least as relevant and competent, for memory-testing purposes, as the other questions asked and was, therefore, improperly asked only if, because of its subject matter, it had collateral prejudicial effects which the other questions did not.

We must acknowledge, however, that for memory-testing purposes the asking of that particular question was of at best only negligible importance to the government, for the attempt to test petitioner's memory and comprehension could have proceeded equally well without it, and there were undoubtedly other questions that could readily have been substituted for it. In short, for that purpose the question, while relevant and competent, was of only marginal materiality and the posing of it could be justified under *Grune-*

would only if it did not in fact have collateral prejudicial effects. If it did, we concede, as we noted at the outset, that the question should not have been asked.

The purpose of the question discussed above is the one that seems to us to be suggested by its context and is the only purpose to which, upon analysis, the question seems logically relevant. The prosecutor's statement, made in answer to the motion for a mistrial, that "I think that is a fact the Jury is entitled to know" (R. 140) suggests, however, that he may have also had in mind a different purpose, turning not on petitioner's memory of the fact but the *fact* itself—namely, the use of petitioner's failure to testify at the prior trials as a prior "inconsistency" with which to "impeach" his "testimony." That purpose was also urged upon, and accepted by, the court of appeals as a permissible reason for seeking to establish the fact as such (R. 392-393). Upon further reflection, however, it seems to us that, as pointed out in the next Point, the prior failure to testify, even if established, would have had no logical tendency to contradict petitioner's only "testimony" in this case—i.e., his implied assertion of incompetence. It may be that, had petitioner responded rationally to the line of inquiry, pursuit of the inquiry further might have, as the court of appeals suggests (R. 392), developed an inconsistency useful for impeachment purposes. But we do not now attempt to justify the question on any ground other than its utility for memory-testing purposes.

C. THE QUESTION COULD HAVE HAD NO SUBSTANTIAL EFFECT UPON  
THE JURY, PERMISSIBLE OR OTHERWISE.

In the usual case in which the defendant does not testify (or did not do so in a prior trial), the danger that the jury will draw an impermissible inference of guilt from that failure is an evident one for the premise upon which the inference depends—"If he didn't do it, he would have said ~~no~~"—is one which must seem obvious to a lay jury. Petitioner and the dissenting judges in the court below assume that, because that danger is present in most cases, it can be accepted without examination that the same danger was present here. It is our view, however, that in the unique circumstances of this case the question asked, apart from its relevance as one of a series of questions probing petitioner's comprehension and memory, had no impact at all upon the jury, permissible or otherwise.

1. In the first place, since no responsive answer was received to the question, and no attempt was ever made to establish the fact by independent means, the jury was never in fact told that petitioner had not testified at his prior trials. Because the question was in a leading form, petitioner assumes that the jury inferred the fact from the question. There is, however, no warrant for that assumption. For all the jury knew, petitioner had in fact testified at his prior trials and the question was put in that form only to provoke from him a vigorous denial that would undermine his pose of not remembering the prior trials.

Moreover, while there might be a danger that the jury would make such an inference had the question

been emphasized and their attention focused on its implications, there is every indication in the record that the question made no impression at all on the jury. It was asked, as we have noted, as the last of a long series of questions the subject matter of which was unimportant and the only purpose of which was to test petitioner's memory and comprehension. The focus of attention was not on the questions or the facts to which they related, but only on the quality and nature of petitioner's replies, the subject matter of the questions asked being quite incidental. In that context of the challenged question, it is hardly surprising that, when the motion for a mistrial was made immediately thereafter, the trial judge was not even aware of the question's having been asked. The surprising thing would rather be that the question had any more impact upon the jury.

In short, to establish the predicate upon which all of petitioner's arguments depend, it is necessary to assume (1) that the jury noted and focused attention on a question given so little emphasis that it was overlooked by the trial judge and (2) that the jury then improperly inferred the fact (*i.e.*, that petitioner had not testified at the earlier trials) from the leading form of the question. That there was no substantial likelihood of the jury's making that inference in the circumstances of this case is, we think, confirmed by the fact that defense counsel apparently did not consider that likelihood to be sufficiently great at the time even to warrant requesting an admonition to the jury that leading questions are not evidence of the facts assumed.

2. In the second place, there was no comment upon, or instructions permitting the use of, petitioner's failure to testify at the prior trials. As we have noted, the incident occurred on the second day of a five-day trial and at no other time during the course of the trial, in the closing arguments, or in the judge's charge, was any allusion made to petitioner's previous failure to testify. Thus, the most that can be claimed is that the jury was able to infer from the question the bare fact that petitioner had not testified at his prior trials. Plainly, however, the jury's bare knowledge of the fact that a defendant has not testified cannot be deemed *per se* to prevent a fair trial, for the jury is necessarily aware of that fact in every case in which the defendant does not take the stand—and, indeed, is often expressly told of it in the usual instruction that it is not to draw any inference from the defendant's failure to testify.<sup>14</sup> What is forbidden, rather, is hostile *comment* on the failure to testify, inviting the jury to draw an adverse inference from that fact; and not even an implicit invitation of that sort can be found here. There was simply the asking of an unanswered question, and that was the end of the matter.

3. The final difficulty with the claim of prejudice is even more fundamental. Let it be assumed that the jury did infer the fact from the question and, al-

<sup>14</sup> That charge may, of course, be given even though not requested by the defendant. See, e.g., *Chadwick v. United States*, 117 F. 2d 902 (C.A. 5), certiorari denied, 313 U.S. 585; *Smith v. United States*, 112 F. 2d 217 (C.A. D.C.), certiorari denied, 311 U.S. 633; *Becher v. United States*, 5 F. 2d 45, 49 (C.A. 2), certiorari denied, 267 U.S. 602.

though no emphasis had been given the matter, that they believed that the fact was a highly significant one that should be brought to bear, if at all possible, in their deliberations. There still remains the logical difficulty, unanswered by petitioner and the dissenting opinion below, of how, in the unique circumstances of this case, that fact *could* be used by the jury, either permissibly or impermissibly. In our view, there was simply no way in which petitioner's previous failure to testify could have had any effect upon the jury's resolution of any of the issues material to this case—namely, petitioner's commission of the acts charged; the credibility of his testimony (*i.e.*, the *bona fides* of his purported irrationality); or petitioner's insanity at the date of the offense.

a. *Commission of the acts charged*.—The usual danger of admitting against a defendant who testifies at a second trial the fact that he did not testify at a prior trial is that the jury will use that evidence not only to discredit his denial of committing the acts at the second trial but to infer that he in fact did commit the acts, believing that if he had not he would have said so the first time. In this case, however, no attempt was made at the third trial itself to deny commission of the acts—either in petitioner's testimony or by other evidence—and the failure previously to deny that he committed the acts could add nothing to the failure to do so at the present trial. As a practical matter, the commission of the acts—established by virtually uncontrovertible evidence—was not in issue, and the sole defense was that of insanity. By the same token, the fact that petitioner had not pre-



viously testified could have substantially affected the outcome of this case only if it bore in some way on the issue of insanity, and we do not understand petitioner or the dissenting opinion below to suggest otherwise.

b. *Credibility of petitioner's testimony.*—Petitioner's "testimony" in this case, as we have noted, had no content other than the implied representation (by his irrational responses) that petitioner was, at the date of the trial, incompetent. The question of the "credibility" of that testimony, in turn, was whether petitioner was, as the Government thought, malingering in maintaining that pose. Use of petitioner's prior failure to testify to impeach that testimony—if it were logically relevant for that purpose—would presumably be permissible under *Raffel*, particularly since in this case the question of credibility (petitioner's mental state at the date of the trial) and the ultimate issue of guilt (petitioner's mental state at the date of the offense) are more readily separable than in the usual case.<sup>15</sup>

Whether permissible or not, however, the difficulty is that the prior failure to testify has no tendency to show whether or not petitioner was malingering at his third trial (i.e., to "impeach" his "testimony" at the third trial). If petitioner were in fact the irrational person he purported to be at the third trial, then, even if it be assumed that his condition was the same at his previous trials, his failure to testify reflects only

<sup>15</sup> As we have noted above (p. 22), it was apparently for this purpose that the prosecutor and the court of appeals thought that the abortive attempt to develop the fact of petitioner's prior failure to testify was justified.

the capricious workings of a disordered mind. That is, since petitioner, if he was not feigning, obviously lacked the capacity to make a rational judgment whether or not to testify, his different conduct at the several trials shows only caprice rather than inconsistency. In addition, of course, petitioner cannot be assumed to have been in exactly the same mental state on the occasion of his several trials. Thus, like petitioner (Pet. Br. 8-9), we do not see in what way the jury might have used petitioner's prior silence to resolve the question whether or not he was malingering at his third trial.

*c. Insanity at the date of the offense.*—The “prejudicial effect” of which petitioner complains must, therefore, be in the danger that the jury would infer from his prior silence that petitioner was sane at the time of the offense. How such an inference might be drawn by the jury, however, neither he nor the dissenting opinion in the court of appeals undertakes to explain. The reasoning, we suppose, is this: (1) although a defendant alleging insanity is perhaps not the most reliable source of information about his own mental condition, if he were in fact insane at the date of the offense he would surely—unless he is now incompetent as well—have some relevant testimony to offer on that issue; (2) since he did not offer it, he must not have been insane. The difficulty with that, however, is that the defendant in this case did purport to be incompetent at the time of the trial. If the jury believed him to be incompetent at trial, as he claimed, that would fully explain his failure to give meaningful testimony of events surrounding, or his condition at

the time of, the offense. If the jury believed him to be malingering, on the other hand, then his prior failure to testify could add nothing to his refusal to testify meaningfully at the third trial and his attempt, instead, affirmatively to deceive the jury.

In summary, while we acknowledge the danger in the usual case that the jury will impermissibly infer guilt from a prior failure to testify, that is so only because of the force of the reasoning by which that inference may be drawn—i.e., if the defendant had not committed the acts charged he would have said so. That reasoning, however, is inapplicable in the unique circumstances of this case, and no other chain of reasoning is apparent by which the jury might have used the fact of petitioner's prior silence—if indeed they inferred it to be a fact—for an improper purpose. There being no likelihood of an improper inference being drawn, the question asked, being otherwise competent and relevant as one of a series of memory-testing questions, was not improper.

D. THE RISK OF PREJUDICE, IF ANY, COULD HAVE BEEN AVOIDED BY APPROPRIATE INSTRUCTIONS, AND A MISTRIAL WAS NOT REQUIRED

In its procedural posture, and the precise nature of the error claimed, this case is unlike either *Grunewald* or *Raffel*, or for that matter any other case of which we are aware involving a reference to a failure to testify. The district court here did not tell the jury that petitioner's prior failure to testify could be used, even for a limited purpose; it did not permit argument to the jury on the inferences to be drawn;

it did not hold that evidence of that failure was admissible (and in fact it was never adduced); and, finally, it did not hold that the question was proper or refuse to admonish the jury to ignore it. Quite literally, all that occurred was that the prosecutor asked the question, the witness replied unresponsively, the petitioner moved for a mistrial, and the district court, without comment, denied the motion. Thus, it is the denial of a mistrial, and only that, that petitioner can assign as error, and to establish that as error he must show, not only that the question was improper or even that it may have had some prejudicial effect, but that the prejudicial effect was so great that nothing short of a mistrial could cure it. We may for purposes of this argument assume that the question was improper, for, even so, we submit that a mistrial was not required.

The usual procedure to challenge a question is, of course, to make an objection and to obtain, after argument, an express ruling by the court on the relevance, competence, and materiality of the question.<sup>10</sup> And if the objection is sustained, the defendant may, of course, also request an admonition to the jury to disregard it and to draw no inferences from its being asked. In this case, however, since the reply to the question was unresponsive, it made no difference that an objection was not made to the question before the witness answered and full curative relief was still

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<sup>10</sup> One of the difficulties of this record, it may be noted, is that because that procedure was not followed, the relevance of the question, and the way in which it might properly be used, if at all, was never explored in the district court.

available to petitioner. Petitioner could, for example, have asked for—and as far as this record shows, obtained—a ruling striking the question and answer as immaterial, an admonition to the jury not to infer from the leading form of the question that petitioner had in fact failed to take the stand, and, if petitioner desired it out of a superabundance of caution, an instruction to the jury that no adverse inferences could in any event be drawn from a prior failure to testify.

Petitioner, of course, did not ask for any such curative admonitions to the jury but chose to use the incident instead in an attempt to obtain a mistrial. That the district court denied the motion for a mistrial does not mean, however, that it necessarily thought the question a proper one. More likely—since it was by far the simplest ground on which to dispose of the matter—it concluded that, since the question was never answered, no harm had been done whether or not the question was proper. Thus, nothing in that ruling implies that the court would have declined a request to admonish the jury not to infer facts from leading questions—a matter in no way dependent on the propriety of the question—or even a request to strike the question and answer as immaterial.

Nor can petitioner complain here of the court's failure so to admonish the jury on its own motion. In the first place, it is hardly error, plain or otherwise, for a court to assume that the jury knows, without an express admonition, that statements and questions by counsel are not themselves evidence. In the second place, there is no reason to believe that peti-

tioner's failure to request precautionary admonitions was due to inadvertence rather than a deliberate (and, indeed, sound) decision of counsel. The question, as we have noted, was the last of a series of questions to which only incoherent responses had been received. None of the questions previously asked had borne on facts material to the case and the focus of attention had been, not on the subject matter of the questions, but on petitioner's behavior on the stand. Asked in that context, the question—to which only another incoherent response was received—was given so little emphasis and had so little impact that not even the trial judge was aware of its having been asked. Under the circumstances, defense counsel—who, the record shows, were otherwise thorough and diligent in protecting petitioner's rights—could reasonably have concluded that the unanswered question had made no more impression upon the jury than upon the judge and that any admonition was not only unnecessary but would serve only to bring to the jury's attention the possible significance of the question. Even so, of course, they quite properly (from the petitioner's viewpoint) (outside the hearing of the jury) moved for a mistrial on the basis of the incident and carefully preserved that basis for appeal by renewing the motion at the close of the evidence and by assigning its denial as error in the motion for a new trial. It is, however, on the record thus made that petitioner must stand here, and he can prevail only by showing, not only that the question was improper in the sense that an objection to it should have been sustained, but that the mere asking of it had an



impact upon the jury so prejudicial that its effect could not have been cured by any appropriate instructions and irrevocably made the trial unfair.

Declaration of a mistrial is, of course, a remedy that is invoked only in extreme circumstances," and the cases are legion holding that improper remarks or questions by counsel, either on the defendant's failure to testify " or other matters," or even an exposure to the jury of inadmissible evidence," can be cured by appropriate instructions. And this Court has applied that rule even to extended argument by counsel on the implications of the defendant's refusal,

<sup>17</sup> For an example of such circumstances—which even then the Court seemed to view as a borderline case—see *Berger v. United States*, 295 U.S. 78, 84–89.

<sup>18</sup> E.g., *Milton v. United States*, 110 F. 2d 556 (C.A. D.C.); *United States v. Di Carlo*, 64 F. 2d 15 (C.A. 2); *Knowles v. United States*, 224 F. 2d 168 (C.A. 10); *Nolen v. United States*, 190 F. 2d 418, 420 (C.A. 6); *Young v. United States*, 168 F. 2d 242, 245 (C.A. 10), certiorari denied, 334 U.S. 859; *Baker v. United States*, 115 F. 2d 533, 544 (C.A. 8), certiorari denied, 312 U.S. 692; *Morgan v. United States*, 31 F. 2d 385 (C.A. 7), certiorari denied, 280 U.S. 556; *Robilio v. United States*, 291 Fed. 975 (C.A. 6), certiorari denied, 263 U.S. 716.

<sup>19</sup> E.g., *Dunlop v. United States*, 165 U.S. 486, 498; *Turner v. American Security & Trust Co.*, 213 U.S. 257, 267; *United States v. Antonelli Fireworks Co.*, 155 F. 2d 631 (C.A. 2), certiorari denied, 329 U.S. 742; *United States v. Nimerick*, 118 F. 2d 464, 466 (C.A. 2), certiorari denied, 313 U.S. 592; *Spirey v. United States*, 109 F. 2d 181, 185 (C.A. 5), certiorari denied, 310 U.S. 631; *United States v. Ginsbury*, 96 F. 2d 882, 884 (C.A. 7), certiorari denied, 305 U.S. 620; *Lau v. United States*, 13 F. 2d 975, 976 (C.A. 8), certiorari denied, 273 U.S. 739.

<sup>20</sup> E.g., *Hopt v. Utah*, 120 U.S. 436, 436–437; *Waldron v. Waldron*, 156 U.S. 361, 382–383; cf. *Delli Paoli v. United States*, 352 U.S. 232, 239–243.

on Fifth Amendment grounds, to answer particular questions put to him at the trial."

This is, of course, a capital case, and the Court should properly be concerned that substantial rights have not been foreclosed by a misstep of counsel. Even in a capital case, however, where the defendant has been represented by competent counsel whose action appears to have been the result, not of oversight, but of a deliberate judgment of the steps that will best serve the interests of the defendant, we do not believe that the asking of a single improper question by the prosecutor should automatically require a mistrial. At the very least, there ought to be required a showing, not only of something more than a

"In *Johansen v. United States*, 335 U.S. 102, in a trial for income tax evasion for 1937, the government, to prove that the defendant received income from a certain racket throughout 1937, asked the defendant whether he had continued to receive such income in 1938. The defendant refused to answer on the ground that, since his plea for 1937 was still open, the answers would tend to incriminate him, the right of privilege being upheld by the trial court. In his closing argument to the jury, the prosecutor commented at length upon the claim of privilege. This Court, although holding that the argument was improper, affirmed the conviction on the ground that, since the prejudicial effect could have been cured by an appropriate instruction, the defendant had waived the error by failing to request such an instruction. The Court, in an opinion by Mr. Justice Douglas, said (p. 201; emphasis added):

" \* \* \* We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him. However unwise the first choice may have been, the range of waiver is wide. Since the protection which could have been obtained was plainly waived, the accused cannot now be heard to charge the court with depriving him of a fair trial. \* \* \*

remote possibility of prejudice, but also of the inadequacy of other measures to forestall that possibility.

In this case, we think, neither requirement is satisfied. As we have shown above, the possibility of prejudice has merely been assumed and, upon analysis, depends upon a series of propositions most of which are at best speculative and others of which are, we think, simply unsupportable: (1) that the jury took note of a question so little emphasized that not even the trial judge was aware of it; (2) that, although the question was never answered and the matter never again referred to, the jury inferred from the question itself the fact that petitioner had not testified at his prior trials; and (3) that the jury inferred from that fact, by a process of reasoning that was never suggested to it and has yet to be explained, that the petitioner was sane at the time of the offense. As to the inadequacy of other measures, short of a mistrial, to deal with the possibility of prejudice (if any), the Court is apparently asked to assume—though petitioner does not even deal with the question—that a jury will not follow even so simple and direct an instruction as one telling it to ignore a single irrelevant question and advising it that a leading question is not evidence of the facts asserted. In short, since no more has been shown here, petitioner's position would seem to be that a mistrial is required whenever an improper question is asked—or an improper comment is made by counsel or a witness or judge—the evidence is offered—from which it is possible for the jury to infer a fact that may, in some undisclosed way, prove to be prejudicial. Unless the principal of causation

instructions is to be abandoned entirely in capital cases, there has been no showing here, we submit, of a likelihood of prejudice so great that nothing short of a mistrial would be adequate to assure petitioner a fair trial.

We recognize that this is a capital case and properly subject to careful review, but even so it is difficult to believe that, in the context of this case, the asking of the single unanswered question, on a subject immediately abandoned when an incoherent reply was received and never again alluded to during the trial, could have had any possible effect on the verdict. As the court of appeals said (R. 394): "The disputed facts and conflicting expert opinions were properly submitted to a jury under instructions which were correct. The 12 jurors in the instant case, like 24 jurors before them, have rejected his claims and have found [petitioner] guilty." There is no reason for a different view of the matter here.

**E. THERE IS NO OCCASION IN THIS CASE TO RECONSIDER RAFFEL V. UNITED STATES**

As we have indicated above, in our view the sole question in this case is whether the question asked by the prosecutor—"This is the first time you have gone on the stand, isn't it, Willie?"—had a prejudicial effect on the jury. It is our view that it did not—or at least not so great an effect that it could not have been cured by appropriate instructions—and that the Court should hold no more than that whether or not the question should have been asked petitioner has not been prejudiced. If, on the other hand, the Court

should hold that the incident was prejudicial and the prejudice could not be overcome by curative instructions, then we concede that the question, though relevant for memory-testing purposes, did not have a sufficient probative value to justify the risk of prejudice and should not, under *Grunewald*, have been asked. Either way, therefore, the question of prejudice is controlling and there is no occasion here to reconsider *Raffel v. United States*, 271 U.S. 494.

It may help, however, in order to make clear why *Raffel* is not involved in this case, to suggest the kind of case that would present that question and the issues that it would raise. Suppose a defendant who did not take the stand at the first trial does testify at his second trial and offers a seemingly air-tight alibi. The prosecutor, on cross-examination, develops the fact that he had not previously testified and, by forcing the defendant to explain the inconsistency, succeeds in obtaining from him either a patently untruthful explanation of his failure to offer the alibi at the first trial or, under the press of that line of cross-examination, an admission that the alibi was fabricated. In such a case, the prior failure to testify would, of course, be of great value in impeaching the defendant's testimony at the second trial—not only by use of the fact itself as evidence of inconsistency but, perhaps even more importantly, by providing a potent line of cross-examination. At the same time, however, there would be an obvious risk that the jury would infer guilt directly from the prior silence. Such a case, which would pose in its sharpest form the question decided in *Raffel*, would, of course, be fully distinguishable



from *Grunewald*. Unlike *Grunewald*, where the prior failure to testify was in a very different kind of proceeding (before the grand jury) and was fully explainable in terms of that difference, there is at least a surface inconsistency in the defendant's different action in the two trials identical in nature and, very likely, in the evidence introduced. And while there might be a satisfactory explanation of the different defense tactics, there would seem to be enough of an inconsistency to warrant—constitutional problems aside—an exploration of the question to seek out that explanation. And on the constitutional question—not reached in *Grunewald*—there may also be a theoretical difference in the scope of the “waiver” of the privilege in the two situations—*e.g.*, viewing an original criminal trial and a retrial as but one proceeding (compare their treatment for double-jeopardy purposes) so that the waiver in the second trial is equally a waiver of the privilege asserted in the first trial, but not considering a waiver in a criminal trial as a waiver of the privilege asserted in other or preliminary proceedings.

Those questions are, of course, difficult and important ones, and they ought be decided, we think, only in a case, such as that supposed, that puts the issues and the considerations bearing on them in sharp focus. The difficulty in this case is that, because of the insanity issue and, more particularly, petitioner's posture of incompetence at the third trial, the development of petitioner's failure to testify at his previous trials had, we think, neither discernible value to the government's case nor discernible impact on petitioner's



case. Being in that respect unique, this case is not, we submit, an appropriate vehicle for a re-examination of *Raffel*. And, since we concede the negligible value to the government's case of inquiry into petitioner's failure to testify at his prior trials, there is not, as we have noted, any necessity to deal with the *Raffel* question. The only question is whether, in conceding the lack of importance of the question to the government's case because of the logical difficulties in making use of petitioner's prior silence in the unique circumstances of this case, we are also right in our contention that, for essentially the same reasons, the question could not have been prejudicial to petitioner.

## II

THE CROSS-EXAMINATION OF THE DEFENSE PSYCHIATRIST (E. Y. WILLIAMS) AS TO THE VIEWS OF A PROFESSIONAL COLLEAGUE UNDER WHOM DR. WILLIAMS TESTIFIED HE HAD RECEIVED TRAINING, AND WHETHER HE SHARED THOSE VIEWS, WAS NOT PREJUDICIAL ERROR

Despite the willingness of government counsel to stipulate to the qualifications of the defense witness, Dr. E. Y. Williams, an expert in psychiatry, the defense desired to have his qualifications enumerated "for the record" (R. 142). During the direct examination Dr. Williams stated that he had had some training and experience at St. Elizabeth's Hospital under Dr. Ben Karpman (R. 142). On cross-examination, after Dr. Williams repeated that he had studied under Dr. Karpman, the following colloquy occurred (R. 167):

Q. Do you know, and don't you know as a fact, Doctor Karpman is one of those psychiatrists that subscribes to the view that every time a person commits a crime that that person is suffering under some mental disorder?

A. Doctor Karpman has never so expressed that to me in my studies with him.

Q. Tell me, sir, do you subscribe to that view?

A. No, sir. I have, each case that I see, I study and come to my own opinion.

Q. Have you not so testified that you have never examined a person in a criminal case and found that person of sound mind?

A. No, sir, I don't remember saying that to you or anybody in the United States. \* \* \*

On redirect examination, Dr. Williams stated that Dr. Karpman's reputation in the field of psychiatry was of the finest (R. 188).

On the ground that the cross-examination was irrelevant and inflammatory, petitioner moved for a mistrial. The motion was denied by the trial court (R. 169).

It is a familiar principle that the range and scope of cross-examination of an expert witness is primarily a matter within the sound discretion of the trial judge. See, 2 Underhill, *Criminal Evidence* (5th ed. 1956), p. 790; 2 Wharton, *Criminal Evidence* (12th ed. 1955), p. 354. He may be questioned as to principles contained in reputable medical journals or other standard treatises to test statements made by him which are based on other professional works. Cf. *Reilly v. Pinkus*, 338 U.S. 269, 275. In this case, Dr. Williams,

in giving his qualifications, testified that he had studied under Dr. Karpman, a psychiatrist at St. Elizabeth's Hospital. It was not inappropriate to ask him whether he was aware of Dr. Karpman's views concerning the relationship between criminality and emotional disorder," both to determine whether he was cognizant of the position taken by an eminent psychiatrist of the District of Columbia and to determine his own views on criminal responsibility.

In any event, as the majority below pointed out, the inquiry produced "nothing except a positive disavowal by the witness of the viewpoint attributed to Dr. Karpman" (R. 389), and therefore, even if improperly asked, the question was totally harmless in effect."

"Dr. Karpman's views on this matter have long been the subject of notice. He has stated: " \* \* \* I belong to the small group of psychiatrists who hold the thesis that criminality is without exception symptomatic of abnormal mental states and is an expression of them." Karpman, *Criminality, Insanity and the Law*, 39 J. Crim. L. & Crimin. 584 (1949); see also, Karpman, *Criminal Psychodynamics*, 47 J. Crim. & Crimin. 8 (1956).

"Petitioner also raises (Br. 3), but does not argue, the issue whether the trial judge committed reversible error in not charging the jury that it could convict him of second degree murder on the evidence of his low intelligence quotient. This is a matter which this Court has held to be peculiarly within the province of the District of Columbia courts to determine for themselves. *Fisher v. United States*, 328 U.S. 463, 476. On at least two occasions, since *Fisher*, the Court of Appeals for the District of Columbia has specifically refused to adopt a rule of "diminished responsibility." On the first appeal of this case (some six years ago) the court deemed it inappropriate to consider the doctrine "until we can appraise the results of the broadened test of criminal responsibility which we recently announced in *Durham*." 214 F. 2d at 883. The *Durham* rule of insanity (214

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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JANUARY 1961.

F. 2d 862) has not been so thoroughly "appraised" in the six years since its adoption as to suggest that now is an appropriate time for reconsideration of the diminished responsibility rule. See Wechsler, *The Criteria of Criminal Responsibility*, 22 U. of Chi. L. Rev. 367 (1955); Krash & Levine, *Memorandum of Dissent*; 26 Journ. Bar Assoc. of D. of C. 316, 330-331 (1959). But, be that as it may, in this very appeal, the majority of the court below rejected the judicial adoption of the rule, considering it to be a problem more appropriately to be dealt with legislatively than in adversary judicial proceedings (R. 391). Unless this Court is ready to overrule *Fisher*, and petitioner suggests no reasons why it should, it should honor this latest decision of the local appellate tribunal.

Nor is there any merit to the other unargued issue that the trial judge erred in not explaining to the jury the meaning of "sound memory and discretion." D.C. Code 22-2401. This language means no more than that the jury must decide whether the defendant was sane or not. *Hill v. United States*, 22 App. D.C. 395 (1903). Careful instructions were given the jury on the insanity issue (See R. 371-372).

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PETITION NOT PRINTED

Office Supreme Court, U.S.

FILED

FEB 10 1961

JAMES R. BROWNING, Clerk

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

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No. 143

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WILLIE LEE STEWART,

*Petitioner,*

v.

UNITED STATES OF AMERICA

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF AP-  
PEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY BRIEF OF PETITIONER

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## INDEX

Reply Brief of Petitioner.

Page

1

### CITATIONS

#### Cases:

<i>Berger v. United States</i> , 295 U.S. 78	5
<i>Durham v. United States</i> , 214 F.2d 862	6, 7
<i>Grunewald v. United States</i> , 353 U.S. 391	2, 4, 8, 9
<i>Raffel v. United States</i> , 271 U.S. 494	3, 8, 9

#### Texts:

Wechsler, <i>The Measurement and Appraisal of Adult Intelligence</i> (4th ed.)	6
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**REPLY BRIEF OF PETITIONER**

The Government's position as stated in its Brief is (1) it has abandoned the position it took before the Court of Appeals as well as the basis upon which the Court of Appeals based its decision; (2) it has conceded that the questions asked of petitioner at the trial concerning his failure to take the witness stand at two prior trials were at best of only "negligible importance" to the Government; (3) it has propounded a new theory of admissibility for these questions—the limited purpose of "memory-testing"—conceding at the same time the "marginal materiality" of

the questions for this purpose; and (4) it contends that this Court should find that no prejudice resulted since the jury may not have heard the questions and the questions could have had no effect on petitioner's credibility or his defense.

The Government states, "In short, for that purpose [memory-testing] the question, while relevant and competent, was of only marginal materiality and the posing of it could be justified under *Grunewald* only if it did not in fact have collateral prejudicial effects. If it did, we concede, as we noted at the outset, that the question should not have been asked." G. Br. p. 21. Thus, argues the Government, repeatedly, the jury could not have inferred guilt from these questions.

This is directly contrary to the Government's position below and the foundation of the majority opinion in the Court of Appeals below. Said the Court:

As we see it, the challenged question bears on appellant's credibility and in some degree on whether he was guilty of the acts charged. In essence the dissent is taking issue with the basic holding of *Raffel v. United States* but until the Supreme Court alters the holding in that case we are bound by it. 275 F. 2d 617 at p. 625.

The Court of Appeals thus found that the questions were prejudicial but admissible while the Government now concedes that these questions were of such marginal materiality that they could be justified under *Grunewald v. United States*, 353 U.S. 391, only if the questions had no prejudicial effect.

The Court of Appeals, concluding that these questions did bear on petitioner's guilt and as well show an incon-

sistency affecting petitioner's credibility, felt itself bound by the decision in *Raffel v. United States*, 271 U.S. 494.

By conceding that these questions were not important for the purpose of impeachment of petitioner's credibility, the Government has taken the position that *Raffel v. United States* is not applicable to this case since *Raffel* holds that a defendant may be examined concerning his failure to take the witness stand at a prior trial only if his answers would have a bearing on his credibility and on the truth of his own testimony in chief. To suggest now that a person, having relied upon the Fifth Amendment to the Constitution, may, for purported test of the witness' memory, be subjected to cross-examination with respect to his exercise of that privilege involves an unwarranted extension of the *Raffel* doctrine that would have a serious effect on the administration of criminal justice. The Government now suggests that the only possible relevance of these questions was not to show an inconsistency but only to test the memory of the petitioner and that even for this purpose the questions were "not important." G. Br. p. 19. The Government also suggests that this theory might have occurred to the prosecutor. "It was apparently the hope of the prosecution that in responding to a series of simple memory testing questions, petitioner might in some way—perhaps by dropping his guard and responding rationally, or, perhaps, by overplaying his pose of knowing nothing of his own circumstances—tip his hand and give the jury a clue that he was malingering." G. Br. p. 20. This theory is directly contrary to the theory of the prosecutor as he stated it to the court following the asking of the disputed questions, "I think that is a fact that the jury is entitled to know, Your Honor" (R. 140). It was on this basis alone that the questions were asked and their admissibility submitted.

There is no more justification to contend, as the Government does now, that these questions were proper for "memory-testing" than there was to contend, as the Government did before the Court of Appeals, that the questions were used to show an inconsistency and "to probe as to why the testimony was not previously offered." 275 F. 2d at 625. Having conceded that the latter theory is untenable, the Government is on no more substantial ground to suggest that "memory-testing" was the possible theory on which the statements might be considered relevant.

The Government arrives at a most unusual conclusion—that the questions did not have sufficient probative value to justify the risk of prejudice, therefore, "the Court should hold no more than that whether or not the question should have been asked petitioner has not been prejudiced." G. Br. 36.

Yet as this Court held in *Grunewald v. United States*, *supra*, the danger that a jury may make impermissible use of testimony by implicitly equating reliance upon the Fifth Amendment with guilt is far from negligible. Here the Government has conceded as this Court found in *Grunewald* that exclusion of the matter referred to could not have been prejudicial to the Government or in the words of the Government's brief, "it was of negligible importance."

To support the contention that no prejudice resulted the Government submits the following, (1) the questions stated in leading form did not elicit a positive or negative response, and, therefore, could have had no effect on the jury, and (2) that the questions were overlooked by the trial court and, therefore, were probably overlooked by the jury.

It is strange indeed for the Government to suggest that a jury would not infer the truth of the subject matter of a leading question from the prosecutor. Certainly no

United States attorney would deliberately incorporate a false premise in a leading question or misstate facts in his cross-examination of witnesses. Such conduct has been condemned by this Court, *Berger v. United States*, 295 U.S. 78, 84, and a jury would certainly be expected to believe the truth of facts stated in a leading question of a prosecutor. Indeed the prosecutor represented to the Court that these were facts the jury was entitled to know.

The second suggestion by the Government that the jury probably never heard or paid any attention to these questions finds no support whatsoever in the record and appears to be only the product of the imagination of counsel for the Government. As was pointed out in the dissenting opinion in the Court below, the prosecutor's query was a parting and final shot not prefatory to further inquiry. 275 F. 2d at 627. The Court is asked to take judicial notice of the layout of the Government's counsel table which is immediately in front of the jury box in the courtrooms in the United States District Court for the District of Columbia. When these questions were asked the prosecutor was standing immediately in front of the jury. The question was stated not once but twice. The court reporter, farther removed from the prosecutor than any of the jurors, had no difficulty hearing and recording the questions. The trial judge followed his usual practice of carefully scrutinizing the subject matter of an objection or motion by having the questions read back at the bench by the reporter. It is totally unrealistic to infer under these circumstances that the questions were not heard by the trial judge, or that the jury neither heard nor paid attention to them.

The argument that these questions could have had no prejudicial effect ignores the distinction between the tests of criminal responsibility in the District of Columbia in 1953 and in 1958.

Petitioner was first tried in June of 1953. At that time the test of competency in the District of Columbia was the so-called "Right and Wrong Test" along with the "Irresistible Impulse Test." *See Durham v. United States*, 214 F. 2d 862 (D.C. Cir. 1954). The Army record of petitioner received in evidence by stipulation showed that petitioner had a measurable Intelligence Quotient of 65, thus a person with intelligence in the feeble minded range, (R. 130), and within the lowest 2.2% of the entire population of the United States. (R. 211). "The Measurement and Appraisal of Adult Intelligence," David Wechsler, Fourth ed. In July of 1954 the United States Court of Appeals in *Durham v. United States*, *supra*, modified the test of criminal responsibility to add the concept that if the crime was the product of a mental defect there is no criminal responsibility. An I. Q. of 65 places one in the category of a mental defective. "The Measurement and Appraisal of Adult Intelligence," David Wechsler, Fourth ed.

Mental deficiency, unlike typhoid fever or general paresis, is not a disease. A mental defective is not a person who suffers from a specific disease process, but one who by reason of intellectual arrest or impairment is unable to cope with his environment to the extent that he needs special care, education, and institutionalization. A mental defective is characterized not only by a lack of ability to care for himself but also by an incapacity to use effectively the abilities he does have. His actions are often not only senseless and inadequate but perverse and antisocial as well. He may be not only stupid but vicious. And the question arises why he is sometimes one and not the other. "The Measurement and Appraisal of Adult Intelligence," David Wechsler, Fourth ed.



At petitioner's first trial it was not a defense that the crime was a product of his mental defectiveness. Therefore, there was no reason for him to testify to demonstrate this condition to the jury, and to offer petitioner for full and complete cross-examination on this issue. At the third trial, however, the court did, as required by the *Durham* decision, charge the jury that the defendant might be found not guilty by reason of insanity if the jury found that petitioner was suffering from a mental defect and that the crime was a product thereof. The jury might have found petitioner not guilty on this issue alone. And this mental defect, scientifically measured in 1946 would have remained the same in 1953 (when the crime was committed) and in 1958 (when the third trial was held). A mental defect is used in the sense of a condition which is not considered capable of either improving or deteriorating. *Durham v. United States*, *supra*, p. 875. Thus, there was cogent reason for petitioner to testify at the third trial which reason did not obtain at the first trial, and the Government's presumption in its Brief (p. 28) that petitioner cannot be assumed to have been in the same mental state on the occasion of his several trials is most incorrect.

But the jury could easily have inferred from the prosecutor's examination that had the defendant been suffering from a mental defect he would have testified at the first trial and did not do so only because he was not a mental defective but to the contrary was guilty and sane, therefore responsible. Therefore petitioner was substantially prejudiced.

The Government's Brief having ~~collected~~ the lack of importance of this cross-examination is forced to engage in a number of flights of fancy and possibilities of inference in an attempt to establish the relevance of these questions and the possibility of lack of prejudice resulting therefrom to petitioner.

The manner in which these questions were stated, since they were not confined by the prosecutor to earlier trials of the specific charge in the case, could have as well inferred to the jury that the petitioner had been tried for different crimes and thus suggest other criminal conduct to petitioner, when there in fact was none. This possibility can as readily be inferred as any of the inferences suggested in the Government's Brief and would alone justify the declaration of a mistrial.

The test laid down by the Court in *Grunewald v. United States* is that where the testimony or evidence is of negligible weight (which is conceded here by the Government) the danger that the jury made impermissible use of the testimony requires a new trial even though the Court should, as in *Grunewald*, instruct the jury that the testimony be specifically restricted to the issue of credibility.

To sustain the Government's position this Court would be required to go considerably beyond the rule established in *Raffel v. United States*. This would carve out a new exception to the rule that abridgment of a privilege arising from the Constitution will not be countenanced by the Federal courts. It would place every defendant in a criminal case in a position of having to decide whether or not to testify in his own defense, by first attempting to evaluate the possibility that if he should testify at a later trial his failure to testify at the earlier trial might be properly brought to the attention of the jury regardless of its probative value if some appellate court should sometime in the future decide that use of this evidence was not prejudicial. It would in effect destroy that freedom of choice which gives vitality to constitutional privileges.

A right enshrined in the Constitution is one which a citizen should be permitted to exercise with complete freedom and not at the peril of his choice being used against

him should he ever attempt to testify in his own behalf. It would destroy the presumption of innocence which applies with full force to the person who refuses to give testimony that might be turned against him.

The decision of the Court below can not be affirmed on the basis of *Raffel v. United States* since the Government has conceded that these questions cannot be justified as impeachment by establishing an inconsistency. Clearly the Court below cannot be affirmed on the basis of *Grune-wald v. United States*. That opinion, we submit, requires that this Court reverse the decision below.

In a capital case, an appellate court may not speculate that impermissible cross-examination might not have had a prejudicial effect on the jury when the questions were of "negligible importance" and where there are cogent reasons for inferring the contrary.

For the foregoing reasons it is respectfully submitted, therefore, that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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February, 1961.

(4679-7)

# SUPREME COURT OF THE UNITED STATES

No. 143.—OCTOBER TERM, 1960.

Willie Lee Stewart,  
Petitioner,  
v.  
United States.

On Writ of Certiorari to the  
United States Court of Ap-  
peals for the District of  
Columbia Circuit.

[April 24, 1961.]

MR. JUSTICE BLACK delivered the opinion of the Court.

The Fifth Amendment to the United States Constitution provides in unequivocal terms that no person may "be compelled in any criminal case to be a witness against himself." To protect this right Congress has declared that the failure of a defendant to testify in his own defense "shall not create any presumption against him."<sup>1</sup> Ordinarily, the effectuation of this protection is a relatively simple matter—if the defendant chooses not to take the stand, no comment or argument about his failure to testify is permitted.<sup>2</sup> But where for any reason it becomes necessary to try a particular charge more than one time, a more complicated problem may be presented. For a defendant may choose to remain silent at his first trial and then decide to take the stand at a subsequent trial. When this occurs, questions arise as to the propriety of comment or argument in the second trial based upon the defendant's failure to take the stand at his previous trial. This case turns upon such a question.

<sup>1</sup> "In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him." 62 Stat. 833, 18 U. S. C. § 3481.

<sup>2</sup> *Wilson v. United States*, 349 U. S. 60.

Petitioner has been tried three times in the District Court for the District of Columbia upon an indictment charging that he had committed first-degree murder under a felony-murder statute.<sup>3</sup> In all three trials, petitioner's chief defense has been insanity but, on each occasion, the jury has rejected this defense and returned a verdict of guilty upon which the District of Columbia's mandatory death sentence has been imposed.<sup>4</sup> After the first two trials, in which petitioner did not testify, the convictions and death sentences were set aside on the basis of trial errors that the Court of Appeals found had prevented a proper consideration of the case by the jury.<sup>5</sup> At the third trial, in an apparent effort to bolster the contention of insanity, petitioner was placed upon the stand and asked a number of questions by defense counsel—a maneuver obviously made for the purpose of giving the jury an opportunity directly to observe the functioning of petitioner's mental processes in the hope that such an exhibition would persuade them that his memory and mental comprehension were defective. Petitioner's responses to

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<sup>3</sup> "Whoever, *being of sound memory and discretion*, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402 of this Code, rape, mayhem, robbery, or kidnapping, or in perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree." District of Columbia Code § 22-2401. (Emphasis supplied.)

<sup>4</sup> Section 22-2404 of the District of Columbia Code provides: "The punishment of murder in the first degree shall be death by electrocution."

<sup>5</sup> The first conviction was set aside because of erroneous instructions on the defense of insanity. 214 F. 2d 879. The second conviction was set aside because of improper argument by the prosecutor. 247 F. 2d 42.

these questions were aptly described by the court below as "gibberish without meaning."

Upon cross-examination, the prosecutor attempted without noticeable success to demonstrate that these irrational answers were given by petitioner in furtherance of his plan to feign a mental weakness that did not exist. To this end, the prosecutor asked petitioner a number of questions about statements petitioner had allegedly made subsequent to his arrest, apparently in the hope that one of these questions would surprise petitioner and provoke a sensible response. When petitioner continued to talk in the same manner that he had used upon direct examination, the prosecutor concluded his cross-examination with the following remarks in the form of questions: "Willie, you were tried on two other occasions." And, "This is the first time you have gone on the stand, isn't it, Willie?"

<sup>6</sup> 275 F. 2d 617, 618. The following excerpt from petitioner's testimony is entirely typical:

"Q. Who is your lawyer?

"A. Well, I mean, I am my own lawyer, as far as my concern.

"Q. Have I been representing you here the last couple days?

"A. As far as I am concerned, you all look the same to me.

"Q. Do you know what is going on in this courtroom the last couple days?

"A. I ain't asked about what is going on. It is up to you go on and describe yourself. I mean, don't ask me. As far as I am just sitting here.

"Q. Did you ever hear the name Harry Honigman [the man with whose murder petitioner was charged] before?

"A. I haven't.

"Q. Do you know you are charged with first degree murder?

"A. As far as I am concerned, I ain't charged with nothing.

"Q. What is first degree murder; do you know?

"A. I don't know."

<sup>7</sup> The record reveals the following exchange at the conclusion of the cross-examination of petitioner by the prosecutor, a Mr. Smithson:

"Q. Willie, you were tried on two other occasions.

[Footnote 7 continued on p. 4.]



The defense moved immediately for a mistrial on the ground that it was highly prejudicial for the prosecutor to inform the jury of the defendant's failure to take the stand in his previous trials. The prosecutor defended his actions on the ground that this "is a fact that the Jury is entitled to know." The trial judge agreed with the prosecutor, denied the motion for a mistrial, and the trial proceeded, culminating in the third verdict of guilty and death sentence. On appeal, the case was heard by all nine members of the Court of Appeals sitting *en banc* and was affirmed by a 5-4 vote—the majority concluding that the issue was controlled by the decision of this Court in *Raffel v. United States*,<sup>9</sup> and the minority concluding that the issue was controlled by our decision in *Grunewald v. United States*.<sup>10</sup> We granted certiorari to consider whether it was error for the trial court to deny the motion for a mistrial under the circumstances.<sup>11</sup>

In this Court, the Government concedes that the question put to the defendant about his prior failures to testify cannot be justified under *Raffel*, *Grunewald*, or any other of this Court's prior decisions. This concession,

"A. Well, I don't care how many occasions, how many case—you say case. I was a case man once in a time.

"Q. This is the first time you have gone on the stand, isn't it, Willie?

"A. What?

"Q. This is the first time you have gone on the stand, isn't it, Willie?

"A. I am always on the stand; I am everything, I done told you.

"Mr. Smithson: That is all."

<sup>9</sup> 275 F. 2d 617.

<sup>10</sup> 271 U. S. 494.

<sup>11</sup> 353 U. S. 391.

<sup>12</sup> 363 U. S. 818. The petition for certiorari also raised objections based upon other alleged errors during the course of the trial. In view of our disposition of the primary issue and because the actions complained of may not arise at any subsequent trial, we find it unnecessary to pass upon these other objections.

which we accept as proper, rests upon the Government's recognition of the fact that in no case has this Court intimated that there is such a basic inconsistency between silence at one trial and taking the stand at a subsequent trial that the fact of prior silence can be used to impeach any testimony which a defendant elects to give at a later trial. The *Raffel* case, relied upon by the majority below, involved a situation in which Raffel had sat silent at his first trial in the face of testimony by a government agent that Raffel had previously made admissions pointing to his guilt. On a second trial, Raffel took the stand and denied the truth of this same testimony offered by the same witness. Under these circumstances, this Court held that Raffel's silence at the first trial could be shown in order to discredit his testimony at the second trial on the theory that the silence itself constituted an admission as to the truth of the agent's testimony. The result was that Raffel's silence at the first trial was held properly admitted to impeach the specific testimony he offered at the second trial. Here, on the other hand, the defendant's entire "testimony" comprised nothing more than "gibberish without meaning" with the result that there was no specific testimony to impeach. Any attempt to impeach this defendant as a witness could therefore have related only to his demeanor on the stand, and, indeed, the majority below expressly rested its conclusion upon the view that the prosecution had the right under *Raffel* to test the genuineness of this sort of "demeanor-evidence" by questions as to why it was not offered at previous trials.<sup>12</sup> But if *Raffel* could properly be read as standing for this proposition, such questions would be permissible

<sup>12</sup> Thus, the majority reasoned: "The logical and permissible first step under *Raffel v. United States*, supra, was to have him say whether he had previously testified in order to lay the groundwork for developing an inconsistency inherent in the difference in his 'demeanor-evidence' in the two trials." 275 U. S. 617, 625.

in every instance, for whenever a witness takes the stand, he necessarily puts the genuineness of his demeanor into issue.<sup>13</sup> The Government quite properly concedes that this cannot be the law since it would conflict with the precise holding of this Court in the *Grunewald* case.<sup>14</sup>

Despite this concession, however, the Government persists in the contention that petitioner's conviction should be upheld, arguing that the error committed was harmless and could not have affected the jury's verdict. This argument is rested upon three grounds: first, that the jury may not even have heard the improper question; secondly, that even if the jury did hear the question, it may not have inferred that petitioner in fact did not testify at his previous trial; and, finally, that even if the jury did infer that petitioner did not testify previously, no inference adverse to petitioner would have been drawn from this fact. The first two of these grounds can be quickly disposed of. We can think of no justification for ignoring the part of a record showing error on a mere conjecture that the jury might not have heard the testimony that part of the record represents. Nor do we believe it reasonable to argue that the jury trying this case would not have inferred that this defendant had failed to testify in his prior trials when the prosecutor asked, "This is the first time you have gone on the stand, isn't it, Willie?" Indeed, the recognition that such an inference will in all likelihood be

<sup>13</sup> This is so because the defendant's credibility is in issue whenever he testifies. If the failure to testify at a previous trial were to amount to evidence that testimony at a subsequent trial was feigned or perjurious, the fact of failure to testify would always be admissible.

<sup>14</sup> The holding in *Grunewald* was that the defendant's answers to certain questions were not inconsistent with his previous reliance upon the Fifth Amendment to excuse a refusal to answer those very same questions. Since defendant's testimony placed his credibility in issue, the necessary implication of that holding is that his prior refusal to testify could not be used to impeach his general credibility.

drawn from leading questions of this kind lies at the root of the long-established rule that such questions may not properly be put unless the inference, if drawn, would be factually true.<sup>15</sup> Thus, the Government's argument that the error was harmless must stand or fall upon the third ground it urges—that the jury's awareness of petitioner's failure to take the stand at his previous trials would not have prejudiced the consideration of his case. The disposition of this contention requires the statement of a few more of the relevant facts of the case.

In connection with the defense of insanity, petitioner had introduced evidence of both mental disease and mental defect, as those terms are applied in the relevant law of the District of Columbia.<sup>16</sup> On the mental disease issue, the testimony was that petitioner was suffering from manic depressive psychosis, a disease which the record shows tends to fluctuate considerably in its manifestations from time to time. On the mental defect issue, the defense introduced evidence that petitioner had an intelligence level in the moronic class. The case went to the jury on both of these points, the jury being directed to acquit if it found the homicide to have been the product

<sup>15</sup> III Wigmore, Evidence (3d ed.), § 780. Wigmore quotes Chitty, Practice of the Law, 2d ed., III, 901, for the proposition: "It is an established rule, as regards cross-examination, that a counsel has no right, even in order to detect or catch a witness in a falsity, falsely to assume or pretend that the witness had previously sworn or stated differently to the fact, or that a matter had previously been proved when it had not." This Court has previously recognized that principle. *Berger v. United States*, 295 U. S. 78, 84.

<sup>16</sup> The difference between the terms "disease" and "defect" was explained in the charge to the jury in the following manner: "We use 'disease' in the sense of a condition which is considered capable of either improving or deteriorating. We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating, and which may be either congenital or the result of injury, or the residual effect of a physical or mental disease."

either of mental disease or mental defect.<sup>17</sup> Petitioner's "testimony" thus raised at least two different issues in the minds of the jury: first, whether petitioner was simply feigning this testimony; and, secondly, whether, if not, petitioner's condition at the time of his third trial fairly represented his condition at the time of the act charged in the indictment.<sup>18</sup>

We think it apparent that the jury's awareness of petitioner's failure to testify at his first two trials could have affected its deliberations on either or both of these issues. Thus, the jury might well have thought it likely that petitioner elected to feign this "testimony" out of desperation brought on by his failure to gain acquittal without it in the two previous trials. Similarly, even if the jury believed petitioner's "testimony" was genuine, it might have thought that petitioner's condition was caused by a mental disease and concluded that it is unlikely that a disease that had manifested itself only one out of three times for exhibition at trial was active at the occasion of the homicide. Or, on the same assumption, it might have thought that petitioner's failure to exhibit himself at the previous trials indicated that the condition manifested at this trial was the result of a worsening in his mental condition since those trials and, consequently, also since the commission of the acts charged in the indictment. There may be other ways in which the jury might have used the information improp-

<sup>17</sup> These instructions stemmed from the test of criminal responsibility that prevail in the District of Columbia under the decision of the Court of Appeals in *Durham v. United States*, 214 F. 2d 862.

<sup>18</sup> This second issue arises from the fact that the jury was not here trying the question whether petitioner was mentally competent to stand trial. Under the District of Columbia practice, that question is decided in a separate proceeding. See District of Columbia Code § 24-301.

erly given it by the prosecution—we have mentioned more than enough already, however, to satisfy ourselves that the Government's contention that the error was harmless must be rejected.

The Government's final contention is, that even if the error was prejudicial the conviction should be allowed to stand on the theory that the error was not sufficiently prejudicial to warrant the granting of a mistrial and the defense made no request for cautionary instructions. One answer to this argument is to be found in the Government's own brief. For, in its argument regarding the possibility that the jury may not have been aware of the improper question, the Government stresses the fact that the question was not emphasized by any reference to it in the instructions to the jury. During the course of this argument the Government expressly recognizes that the danger of the situation would have been increased by a cautionary instruction in that such an instruction would have again brought the jury's attention to petitioner's prior failures to testify. Plainly, the defense was under no obligation to take such a risk. The motion for a mistrial was entirely appropriate and, indeed, necessary to protect the interests of petitioner.<sup>19</sup>

We thus conclude that this conviction and sentence against petitioner cannot stand. In doing so, we agree with the point made by the Government in its brief—that it is regrettable when the concurrent findings of 36 jurors are not sufficient finally to terminate a case. But under

<sup>19</sup> *Johnson v. United States*, 318 U.S. 189, relied upon by the Government, does not sustain its argument on this point. There the defense made no objection at all, choosing instead to rest its chances upon the verdict of the jury. Petitioner here made no such choice for he has repeatedly pressed his right to a mistrial in the District Court, in the Court of Appeals, and here.



our system, a man is entitled to the findings of 12 jurors on evidence fairly and properly presented to them. Petitioner may not be deprived of his life until that right is accorded him. That right was denied here by the prosecutor's improper questions.

*Reversed.*

# SUPREME COURT OF THE UNITED STATES

No. 143.—OCTOBER TERM, 1960

Willie Lee Stewart,  
Petitioner,  
v.  
United States.

On Writ of Certiorari to the  
United States Court of Ap-  
peals for the District of  
Columbia Circuit.

[April 24, 1961.]

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER join, dissenting.

The result which the Court draws from its account of the trial seems not unreasonable. But by force of what the Court does not relate, there is such disparity between its account and the almost nine hundred pages of the trial transcript that, in fairness, the Court's opinion hardly conveys what took place before the jury and what must therefore, rationally be evaluated in attributing any influence on the jury's verdict to the questions which the Government now concedes were improperly asked. "In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively, and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution." *Johnson v. United States*, 318 U. S. 189, 202 (concurring opinion).

What emerges from the transcript, at the outset, is that Willie Lee Stewart's killing of Harry Honikman was practically never in issue. The testimony of two eye-witnesses who positively identified Stewart as the killer

Honikman's daughter took the stand and testified at the trial. A transcription of her mother's testimony at a previous trial, corroborating the daughter's account of the killing, was read to the jury.

was not seriously challenged. A third witness had examined in Stewart's hands, shortly before the killing, the gun which unimpugned ballistic evidence established fired the lethal shots. The testimony of a fingerprint expert, also unimpugned, linked Stewart to the killing. Nowhere in their opening or closing statements did experienced defense counsel ask the jury to doubt that Stewart was the killer: the whole of the defense was that Stewart was not responsible because insane.

Insanity was not merely, as the Court says, Stewart's chief defense; it was his defense. His lawyer put it aptly: "[The prosecutor] knows as well as I, as anybody in this courtroom, the only defense we have is insanity." Thus, there is not involved in this case the danger that the jury, being told as laymen of the defendant's previous failure to testify in his own behalf, reasoned that if Stewart did not do the acts with which he was charged he would have said so.<sup>6</sup> Here, those acts were not contested. If prejudice is not to be blindly assumed, but to be discovered in the record, it must be discovered by some more subtle train of associations.

Stewart's trial took the major part of six court days: twelve calendar days. The Government's opening case, presenting the testimony of the eyewitnesses, fingerprint and ballistic experts, arresting and investigating officers, etc.—ten witnesses in all—consumed a day and a half. Thereafter, beginning on the second court day and running into the third, the defense put in the testimony of a series of witnesses—Stewart's cousin, landlady, friend, sister, employer, wife, neighbor, sister-in-law—all of whom recounted episodes of Stewart's behavior tending

This remark was made at the bench, out of the hearing of the jury.

In addition to the testimony of Mrs. Honkman, that of two other witnesses was read to the jury. The remaining seven appeared at this trial.

to show his unsoundness of mind.<sup>4</sup> These episodes spanned the period of his life from early childhood until the time of the killing, and they painted what, to say the least, is a bizarre portrait.

If the jury believed them, they believed, *inter alia*: (1) that Stewart, as a child, threw all his food on the floor, ran away from school, tore his clothes off, cut them up, roamed the house at night; (2) that Stewart's aunts and brother were of unsound mind, in that they would often sit with saliva running out of their mouths and would never say anything; (3) that Stewart, as an adult, once shot at his wife, and sat on his wife and beat her while she was pregnant; (4) that he once punched a hole in a low ceiling with his fist for no apparent reason and, on another occasion, threw all the food out of his refrigerator and beat the refrigerator door so hard with his fists that he broke it; (5) that he locked his children out of the family's room in cold weather; that he threatened to throw one of his children, while a baby, out of the window and threatened to throw another into a burning stove; that he would have done both if not forcibly prevented; (6) that he insisted on pushing through a boarded front door and jumping in and out of the house at a time when the porch was under repair; that he once jumped out of a window; that he threw his nephew's toy piano out of a window; (7) that he attempted to have sexual relations with his sister-in-law in her husband's presence; (8) that, having been told by his employer that he would get a requested pay raise, he kicked down a brick wall that he had been constructing. Following this testimony, defense counsel read to the jury portions of Stewart's military record, revealing that a medical discharge had been recommended for Stewart after a fight with another

<sup>4</sup>Three of these eight witnesses took the stand. In the case of the other five, excerpts from their testimony at prior trials were read.

soldier, largely on the basis of tests taken at that time which placed Stewart's intelligence in the feeble-minded range.

On the third trial day, the defendant took the stand and was examined and cross-examined briefly. His testimony occupies fifteen pages of the eight hundred and eighty-five-page trial minutes. Let this sample of it give its quality of meaninglessness:

"Q. What is your wife's name; Willie?"

"A. You should ask her that. As far as I am concerned, I don't have no wife. I don't consider I have any; therefore, I can't say what her name is.

"Q. Have you ever been married?"

"A. I wouldn't say married.

"Q. What do you mean you wouldn't say married?"

"A. Well, as far as I concerned, nobody is married, as far as any way of understanding.

"Q. Do you have any children?"

"A. I don't consider—I have none. She say I have some. I don't have none. If she say I have some, I guess I have to leave it to her. As far as my concern, I don't have none and I don't want none.

"Q. Do you know where you are now?"

"A. Looking at you, as far as I know.

"Q. What is my name?"

"A. I don't know.

"Q. Who is your lawyer?"

"A. Well, I mean, I am my own lawyer, as far as my concern."

On his direct examination, Stewart testified that he did not know what kind of a building he was in, that he had never shot nobody but that the white folks told him he was supposed to kill; that he considered himself master, as far as the killing situation; that he was the monkey, the monkey with the tail; that he still remained

to see that monkey with the tail; that he had been told to kill—his mind tells him to kill—and he was always going to kill until he conquered; that the good man upstairs say so; that he had talked to God and God told him to conquer everybody, that he was the master; he hated everybody; counsel shouldn't ask him no more. The brief cross-examination proceeded in the same vein. The prosecutor's questions, designed less to elicit any information from the witness than to call forth some revealingly intelligent response, some sign of memory or understanding, which would show that Stewart's apparently grave mental estrangement was a pose, evoked only wild and unresponsive answers. The cross-examination closed on the following dialogue:

"Q. You can see me, can't you, Willie?

"A. Sure. You can see me, too, can't you? We see one another. I am going to be the master and you ain't going to stop me and nobody else.

"Q. Tell me, Willie, do you know a Dr. Williams?

"A. Dr. Williams?

"Q. Yes, E. Y. Williams.

"A. Why you keep asking me? If I told you once, I told you a hundred time, I am my own doctor. Why you keep asking me the same question over and over again. I told you I am my own doctor.

"Q. Do you know a Deputy Marshal by the name of Ballinger?

"A. I am my own marshal. I am everything. That takes care of the whole question. I am everything. Everything you ask me, I am talking to me. I am it.

"Q. Willie, you were tried on two other occasions.

"A. Well, I don't care how many occasions, how many case—you say case. I was a case man once in a time.



"Q. This is the first time you have gone on the stand, isn't it, Willie?"

"A. What?"

"Q. This is the first time you have gone on the stand, isn't it, Willie?"

"A. I am always the stand; I am everything, I done told you.

"MR. SMITHSON [the prosecutor]: That is all.

"THE WITNESS: You and nobody else going ever stop me.

"THE COURT: Mr. Carey [defense counsel], anything further?"

"MR. CAREY: That is all."

Defense counsel immediately moved for a mistrial, which was denied. The defense then qualified Dr. E. Y. Williams, a psychiatrist, as an expert witness. Responsive to hypothetical questions predicated upon Stewart's army record, the various instances of odd behavior testified to by the previous lay witnesses, and the circumstances of Honikman's killing, Dr. Williams gave his professional opinion that Stewart was, at the time of the killing, suffering both from a mental defect and a mental disease. He explained in detail the psychiatric significance of Stewart's intelligence quotient of sixty-five, a rating which, he told the jury, would characterize Stewart as a moron. He further typified Stewart's mental disease as manic-depressive psychosis and, by the use of a blackboard, diagrammed and described the cyclic character of that disease. He testified that his own examination of the defendant in 1953 had yielded insufficient personal history to base a diagnosis, but that he had examined Stewart on several occasions since that time and found nothing which would change his opinion that Stewart was a manic-depressive psychotic. Dr. Williams

was cross-examined at length on the afternoon of the third and the morning of the fourth days of the trial.

The remaining three trial days were taken up, in large part, by the testimony of seven government witnesses put forward to rebut Stewart's defense of insanity. Two psychiatric experts testified that they had examined Stewart shortly after the killing in 1953 and found no mental defect or disease. A neighbor and friend of Stewart's who had known him for six years and seen him regularly during at least three years preceding 1953 testified that, on the basis of Stewart's conduct in his presence, he believed that Stewart was normal. An attendant at Saint Elizabeth's Hospital, where Stewart had been committed during late 1957 and early 1958, described Stewart's behavior there as that of a model patient who had caused no specific trouble, gotten along with others, played cards and checkers, been seen with a Bible, etc. A police lieutenant at the District of Columbia jail similarly related Stewart's activities at the jail over the four years between the killing and the present trial. Through this witness there were put in evidence as exhibits portions of the jail file tending to show that Stewart had signed certain forms, made certain written requests, and sent numerous letters to his wife and sister-in-law. A third psychiatric expert, who had examined Stewart early in 1958, testified that he found no evidence of mental disease and did not regard Stewart as a mental defective. A fourth testified, on the basis of two examinations made in 1958, that the defendant was not a manic-depressive psychotic. Both of these psychiatrists agreed that Stewart was malingering at the time of their examinations.

It is unnecessary to describe in greater detail here the testimony of these seven government witnesses. All were cross-examined, two of the experts at considerable length. On the sixth trial day, counsel for the Government and

for the defense addressed the jury. Neither in these exhaustive closing statements nor in the court's extended charge was any reference made to the two questions, asked several days before and, in effect, unanswered, which are now assigned as prejudicial error. The jury retired, deliberated, and found the defendant guilty.

On the totality of this record, with solicitous regard for the heavy obligation which rests upon us in a capital case, I cannot but conclude that the prosecutor's questions concerning Stewart's prior failures to testify are of that class of errors "which do not affect the substantial rights of the parties," and which, therefore, this Court, by virtue of an Act of Congress, is under duty to disregard. 40 Stat. 1181 (1919), in its present form 63 Stat. 105, 28 U. S. C. § 2111. This is so in light of a number of considerations, none of which viewed in isolation might be determinative, but whose sum—in the whole context of the trial—convinces me that the Court's conjectures of prejudice are chimerical.

First, Stewart never intelligibly answered the questions. The jury was not told and did not know as a fact that he had not previously taken the stand. The Court now finds that the jury may nevertheless have inferred the information from the leading form of the prosecutor's questions. But this conclusion should not be reached merely on the basis of the broad generalization that "such an inference will in all likelihood be drawn from leading questions of this kind." Such an abstraction does not get us to the heart of the question before us. That question, in one aspect, is whether it is likely that *this* jury in the circumstances of *this* case drew the inference from *this* leading question. It is not only not likely, but overwhelmingly unlikely.

The question was not pressed or persisted in by the prosecutor so as to concentrate the jury's attention on it as an assertion of fact. It was once repeated—when

Stewart asked "What?"—and then dropped. It was asked in a setting in which it is not to be assumed, because most improbable, that the jury took in and paid heed to the content of the prosecutor's questions as such, particularly the one now so inflated in importance. On the stand was a witness who had just testified that he was the master and the monkey with the tail and that he had been told by God to conquer and kill. His responses appeared raving and incoherent. The only significance of his testimony, of course, was his demeanor, and it was upon the manner and character of his responses, not upon the subjects inquired into, that the jury can plausibly be supposed to have focused. The offending question followed a series of others—"You can see me, can't you, Willie?" "Willie, do you know a Dr. Williams?" "Do you know a Deputy Marshal by the name of Ballinger?"—which had absolutely no significance of content, except insofar as they prodded the witness to respond. There is no reason to think that the jury could have regarded the questions concerning previous failure to testify any differently, or attributed special significance to them. In any event, assuming that the jury were given to pondering subtle inferences in the face of this manifest madman, they could have learned no more from the prosecutor's questions than what Stewart's own counsel had already elicited. The jury knew that this defendant had been tried before because testimony from prior trials had been read to them. Yet defense counsel asked Stewart on direct examination: "Have you ever taken an oath?" and Stewart answered: "Not that I knows of."

Even had the jurors not been absorbed by the eye-catching spectacle of Stewart on the stand, and even had the unanswered questions been answered, the inference attributed to the jury by the Court would hardly have

been a probable one. For the prejudice which the Court conceives does not arise from the simple knowledge that Stewart had not previously testified. It arises only upon the supposition that the jury indulged conjectures concerning the reasons for his not testifying, and upon the further supposition that, in the course of those conjectures, it rejected alternatives favorable to the defense—for example, that Stewart, being insane, capriciously refused to go on the stand—and fixed on the explanation that Stewart was sane at the time of the earlier trials. Perhaps, were there nothing else in this case, this chain of suppositions might be entertainable. But the weakness of its links is one more factor making it implausible to find prejudice here.

Finally, these two concededly impermissible questions—more accurately, a single question once repeated at the witness' request—must be viewed in the perspective of the proceedings as a whole. Asked and left unanswered on the third day of a six-day trial at which eighteen witnesses testified and the testimony of eight more was read to the jury, the questions were never again adverted to. They had been preceded by a series of what the jury cannot but have found startling accounts of Stewart's behavior, were contemporaneous with a glaring display of the symptoms of madness, and were followed by a two-day battle of expert witnesses—one accoutered with blackboard and chalk—all addressed to the question of Stewart's sanity. It weaves solidities out of gossamer assumptions to attribute to fleeting and argumentative implications of fact in a leading question an impact so ponderous as to discredit and reverse a jury's verdict in the context of a record that impressively carries the contrary meaning. The jury was not left to pick at such threads in order to weave the cords of its verdict. On both sides—by both the prosecution and the defense—

strong, heavy cables were furnished it. To suppose that, even if noticed when asked and made the occasion of implausible deductions, these questions amounted to more than a whisper drowned in the compulsion of ear-resounding testimony, seems to me a striking example of pursuing a quest for error.

More than a half-century ago, William H. Taft, reflecting his wide experience even before he became Chief Justice, laid this charge at the door of the courts:

" . . . The . . . disposition on the part of the courts to think that every provision of every rule of law in favor of the defendant is one to be strictly enforced, and even widened in its effect in the interest of the liberty of the citizen, has led courts of appeal to a degree of refinement in upholding technicalities in favor of defendants, and in reversing convictions that render one who has had practical knowledge of the trial of criminal cases most impatient."

" . . . When a court of highest authority in this country thus interposes a bare technicality between a defendant and his just conviction, it is not too much to charge some of the laxity in our administration of the criminal law to a proneness on the part of courts of last resort to find error and to reverse judgments of conviction."

I am convinced that today's decision falls within these weighty strictures. To explain the jury's rejection of Stewart's sole defense of insanity, with its consequent finding of guilt, on the ground, as a matter of assumption, that the jury was influenced by the two questions on which the verdict is reversed here, is to show less respect

<sup>5</sup> Taft, *The Administration of Criminal Law*, 15 *Yale L. J.* 1, 15 (1905).



for the jury system than do the opponents of the system.<sup>6</sup> One does not have to accept all the encomia which opinions of this Court have showered on the jury's functions and values, not to attribute fecklessness to the twelve men and women chosen to sit in this murder case. To make such attribution is to be unconsciously betrayed, as sophisticates sometimes are, into a depreciation of the capacities of the run of men. I dissent from the judgment of the Court:

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<sup>6</sup> See e. g., Frank, *Courts on Trial* (1949), cc. VIII, IX.

# SUPREME COURT OF THE UNITED STATES

No. 143.—OCTOBER TERM, 1960.

Willie Lee Stewart,  
Petitioner,

v.

United States.

} On Writ of Certiorari to the  
United States Court of Ap-  
peals for the District of  
Columbia Circuit.

[April 24, 1961.]

MR. JUSTICE CLARK, with whom MR. JUSTICE WHITTAKER joins, dissenting.

It may be that Willie Lee Stewart "had an intelligence level in the moronic class," but he can laugh up his sleeve today for he has again made a laughing stock of the law. This makes the third jury verdict of guilt—each with a mandatory death penalty—that has been set aside since 1953. It was in that year that Willie walked into Harry Honikman's little grocery store here in Washington, bought a bag of potato chips and a soft drink, consumed them in the store, ordered another bottle of soda, and then pulled out a pistol and killed Honikman right before the eyes of his wife and young daughter. The verdict is now set aside because of some *hypotheticals* as to what the jury *might* have *inferred* from a single question of Willie as to whether he had testified at his other trials. In my view, none of these conjectures is sufficiently persuasive to be said to cast doubt on the validity of the jury's determination. Let us first review the setting of the fatal question in the trial.

The jury heard evidence for six days and from some 26 witnesses. The printed record here, which is only partial, consists of 400 pages. Willie Stewart's "gibberish" comprises nine pages, representing perhaps some 20 minutes of testimony. It came during the third day of the trial. Mr. Carey, Willie's counsel, had placed him on

the stand. He had asked on direct examination, "Have you ever taken an oath?" Willie replied, "Not that I knows of." Willie was also asked by his counsel, "Did you ever stand trial before this trial for the murder of Harry Honikman?" He answered, "Well, you talk. You just go ahead and explain yourself. Have you ever stand trial? Go ahead. Don't ask me. I don't know." Mr. Carey had not represented Willie on the other trials. Carey then asked, "Were you ever tried for first degree murder before this time?" And Willie replied, "I ain't never been tried. I ain't never been tried." With these openings made by Carey, the Government, on cross-examination, asked the same questions. No issue is made of the examination relating to the fact of prior trials. Then came the question which has brought on this reversal: "This is the first time you have gone on the stand, isn't it, Willie?" There was no objection. Willie answered, "What?" And the Government's counsel again asked the same question in identical words. Still there was no objection. Willie answered: "I am always the stand; I am everything, I done told you." Thereafter Willie was excused as a witness, whereupon his counsel approached the bench and made his motion for mistrial. He asked for no curative instruction. Counsel had set his trap, lain in wait and was now demanding all or nothing. The demand for a mistrial was denied.

A government witness then testified that on the very night of the murder Willie was playing cards, that he exhibited the pistol used in the slaying to one of the players, that he left the card game before the hour of the murder, and that he returned to the card game after the hour of the murder and continued playing cards until about 2 a. m. This witness testified, "he [Willie] seemed normal to me." This was followed by testimony of an aide at St. Elizabeths Hospital and a guard at the District jail as to his conduct all during the period after his

## STEWART v. UNITED STATES

3

arrest up until a few weeks before his third trial. All said that he was perfectly normal; that he talked freely and understood the conversation; that he used a Bible and a dictionary, played bid whist and checkers and was a "model" patient or prisoner. His jail file revealed that he mailed letters to his wife and sister-in-law, both of whom testified in his behalf; during April, October and November, 1953; July, August, September and October 1954; October, November and December 1955; January, February and March, 1956; and October, November and December, 1957; and forwarded his wife \$10 on each of two occasions, once in 1954 and the other in 1955. On several occasions he sent memo requests for conferences with jail officials. He asked for work to pass the time while in the District jail and actually put in many hours working day-in and day-out during the time of his custody. He first did cleaning, then plumbing, and finally was continually engaged in painting cell blocks through-out the jail. In 1957 his son was ill and he requested permission, which was granted, to visit him in custody. These witnesses all related that Willie acted normal during this period. In fact, his only expert witness, a psychiatrist, testified that he could not decide in June 1953 when he examined Willie whether or not he was suffering from a mental disease. However, he stated that after talking with Willie's sister-in-law and hearing their background story, he decided that Willie suffered a manic depressive psychosis. The three government psychiatrists, two of whom examined him in March 1953, found him "perfectly normal." He answered questions of them freely, went through various tests cooperatively and was found to be in "average normal range of intelligence." Each agreed that Willie was later malingering, i. e., feigning mental illness. This began shortly before his third trial. In addition, Willie had served two enlistments in the Army before 1953. On

discharge he was found "illiterate but not mentally defective."

In the light of this testimony, I find the hypotheses of the Court, with due deference, entirely unrealistic, if not completely absurd. The crucial date was the time of the killing, 1953, not the date of the third trial, 1958. Despite this and the uncontradicted evidence, detailed above, of Willie's normality all during the period 1953-1958, the Court assumes that, from the asking of the question by the prosecutor, the jury believed that Willie had not testified in the two prior trials and therefore the jury "might" have inferred that (1) Willie "elected to forgo this testimony" [gibberish] out of desperation brought on by his failure to gain acquittal previously; or (2) the jury "might have thought" Willie suffered from a mental disease but "concluded that it is unlikely that a disease that had manifested itself only one out of three times for exhibition at trial was active at the occasion of the homicide"; or (3) the jury "might have thought" that the condition was weakening as indicated by his action at the trial.

In the first place, it seems to me a violent assumption to say that the jury believed, solely from the Government's question on cross-examination, that Willie had not testified at the prior trials, especially since he had already testified in response to a query from *his own counsel* on direct examination that he had never been under oath. Moreover, in opening up the issue of prior trials, the defense counsel was obviously trying to leave the impression with the jury that they had not concluded in guilty verdicts. When he received answers such as "You talk"—"You go ahead and explain"—"Don't ask me," he repeated the question. And the government counsel got like answers to his questions: "I ain't never been tried before," etc. And the answer to the question found prejudicial was first a "What?" and upon its repetition, "I am always

the stand." Using the majority's speculative approach, it is the more likely that the jury thought from those questions that the previous trials resulted in hung juries and never speculated upon the nice distinctions the Court makes as to Willie's demeanor.\* The uncontradicted evidence was that he was a faker. They needed no inference to so conclude. Discounting the speculative effects of his own counsel's question on oaths, and the Government's question on testifying, his answers themselves might well have led the jury to believe that he did testify on the previous trials. In any event, a simple instruction to the jury to consider this trial alone, to strike out of its minds and give no consideration whatever to any reference to a former trial or to any event or thing that might or might not have happened there, would have certainly been sufficient. But Willie did not ask for this. He wanted "all or none" and the Court is giving him "all." But, returning to the hypotheses, whether or not Willie "elected" to feign his testimony was not the question. The jury's concern was whether he did feign it, and the uncontradicted testimony was that he did so. Secondly, the only testimony as to Willie's activity on the very night of the killing was that of the card player. He stated that Willie "seemed normal to me." How the jury might infer from the prosecutor's question that Willie had a mental disease but it was inactive at the time of the murder is beyond me.\* Every witness testified to the contrary—save one psychiatrist—and even, he said, that his examination of Willie was inconclusive. The jury knew it had been five years since the killing and that both lay and medical evidence—uncontradicted—was that Willie was normal during all that period. Lastly,

\*If there was any impression relating to Willie's failure to take the stand in prior trials, it was surely due to the questioning by his own counsel on the issue of oaths.



as to the disease worsening, that possibility had no relevancy to the condition in 1953 at the time of the killing.

I might add that, as I read the Government's brief, it conceded only that the question asked Willie "was of but negligible importance to the government's case." The sole issue, it said, was whether the question was prejudicial. This does not license the Court to find other and further concessions as to the *Raffel* and *Gracwald* cases. Nor do I find the Government contending, in its point that no prejudice resulted from the question, that "the jury may not even have heard the improper question." To so state its attitude makes the Government appear ridiculous. Its true position was that one could not assume, as the Court does, that "the jury noted and focused attention on a question given so little emphasis that it was overlooked by the trial judge." I add that in the light of the long trial, the uncontradicted evidence as to Willie's malingering and the fact that the question was never mentioned again during the remaining three days of the trial, the jury did not need, nor as a matter of relevancy was it able to go through the mental gymnastics the Court supposes.

I note that the Court does adopt one point made by the Government. It says "that it is regrettable when the concurrent findings of 36 jurors are not sufficient finally to terminate a case." I, too, agree with that, but in view of the Court's approach I would add that its regret is tempered by its willingness to indulge in such hypothesizing as to effectively remove from our law the concept of harmless error in capital cases.